

**Present: Manzoor Ahmad Malik, Mazhar Alam Khan Miankhel and Syed Mansoor Ali Shah, JJ
NAVEED ASGHAR and 2 others---Petitioners**

Versus

The STATE---Respondent

Jail Petition No. 147 of 2016, decided on 7th December, 2020.

(Against the judgment of the Lahore High Court, Rawalpindi Bench, Rawalpindi dated 12.02.2016 passed in Criminal Appeal No. 16-J of 2011, Criminal Revision No. 31 of 2011 and M.R. No. 25 of 2011).

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

---Ss. 374, 375, 376 & 423---Constitution of Pakistan, Arts. 9, 10A & 14---Murder reference sent by the Trial Court to the High Court for confirmation of death sentence---Scope---Duty cast on the High Court in deciding a murder reference under S.374, Cr.P.C. was a heavy one and could only be discharged once the entire evidence was reappraised to fully exhaust all the points having a bearing upon the guilt or innocence of the convicted person---High Court, in dealing with a murder reference, was not only to see whether the order passed by the Trial Court was correct, but to examine the case for itself and even direct a further enquiry or the taking of additional evidence if the Court considered it desirable in order to ascertain the guilt or the innocence of the convicted person---Scope of a murder reference and principles in relation thereto stated.

Normally, the High Courts hear and decide the appeal filed by the convicted person and the reference sent by the trial court for confirmation of the death sentence, together. While doing so the Judges of the High Courts some times remain content with examining and deciding only the arguments and contentions advanced in appeal, and do not by themselves scrutinize the whole material available on record of the case. Apart from deciding those arguments and contentions, it was incumbent upon the High Courts, in discharge of their statutory duty under sections 375 and 376 of the Code of Criminal Procedure, 1898 ("Cr.P.C."), to read and appraise each and every piece of evidence, and to examine also whether any evidence had been improperly admitted or excluded, or had been misread or non-read by the trial court.

Ordinarily, in a criminal appeal against conviction, the appellate Court, under section 423 of the Cr.P.C., could dismiss the appeal if the court was of the opinion that there was no sufficient ground for interference, after examining all the grounds urged before it for challenging the correctness of the decision given by the trial court. It was not necessary for the appellate court to examine the entire record for the purpose of arriving at an independent decision of its own whether the conviction of the appellant was fully justified. The position was, however, different where the appeal was by an accused who was sentenced to death, so that the High Court dealing with the appeal had before it, simultaneously with the appeal, a reference for confirmation of the capital sentence under section 374 of the Cr.P.C. On a reference for confirmation of sentence of death, the High Court was required to proceed in accordance with sections 375 and 376 of the Cr.P.C. and the provisions of these sections made it clear that the duty of the High Court, in dealing with the reference, was not only to see whether the order passed by the trial court was correct, but to examine the case for itself and even direct a further enquiry or the taking of additional evidence if the Court considered it desirable in order to ascertain the guilt or the innocence of the convicted person.

Bhupendra Singh v. State of Punjab AIR 1968 SC 1438 ref.

Section 374 of the Cr.P.C. provided that when the Court of Session passed sentence of death, the proceedings shall be submitted to the High Court and the sentence shall not be executed unless it was confirmed by the High Court. As the death sentence passed by the trial court, i.e., the Court of Session, could not be executed without being it confirmed by the High Court, proceedings before the High Court on reference under section 374, Cr.P.C. was yet another tier of judicial assessment of the evidence to examine "any point bearing upon the guilt or innocence of the convicted person." The High Court had been given very wide powers to prevent any possible miscarriage of justice. The proceedings were a reappraisal and reassessment of the entire facts of the case and of the law applicable. This extensive power actually

cast an onerous duty on the High Court to ensure safe administration of criminal justice by considering in the reference proceedings all aspects of the case and coming to an independent conclusion, apart from the view expressed by the Court of Session. The High Court had to decide on reappraisal of the whole evidence whether the conviction was justified and, having regard to the circumstances of the case, whether the sentence of death was appropriate.

Jumman v. State of Punjab AIR 1957 SC 469; *Ram Shankar v. State of West Bengal* AIR 1962 SC 1239 and *Masalti v. State of U.P.* AIR 1965 SC 202 ref.

The worth and sanctity of human life were a test and mark of civilized societies, and were increasingly reflected in the criminal jurisprudence. The Legislature had provided in confirmation proceedings a final safeguard and had laid this duty upon the High Court. The duty of judgment was laid in the first instance upon the trial Judge. But equally and with all that weight, the High Court in confirmation proceedings must finally weigh for itself the whole evidence, and was to confirm the conviction and sentence or make any other order according to its own final conclusion on the guilt or innocence of the sentenced person in the discharge of the duty laid upon it by law. Right to life and liberty, right to fair trial and right to dignity were fundamental rights guaranteed under Articles 9, 10A and 14 of the Constitution. The importance of human life went to the heart of these fundamental rights, the rigorous two-tiered process of appraisal, assessment and examination under section 374, Cr.P.C. also met the test of these fundamental rights. The duty cast on the High Court in deciding a murder reference under section 374, Cr.P.C. was a heavy one and could only be discharged once the entire evidence was reappraised to fully exhaust all the points having a bearing upon the guilt or innocence of the convicted person.

AIR 1921 Sindh 84 ref.

(b) Criminal trial---

---Heinous nature of crime---Nature of the crime should not influence the mind of the judge---Duty of the court was to assess the probative value (weight) of every piece of evidence available on record in accordance with the settled principles of appreciation of evidence, in a dispassionate, systematic and structured manner without being influenced by the nature of the allegations.

The frightful nature of crime should not blur the eyes of justice, allowing emotions triggered by the horrifying nature of the offence to prejudge the accused. Cases were to be decided on the basis of evidence and evidence alone and not on the basis of sentiments and emotions. Gruesome, heinous or brutal nature of the offence may be relevant at the stage of awarding suitable punishment after conviction; but it was totally irrelevant at the stage of appraising or reappraising the evidence available on record to determine guilt of the accused person, as possibility of an innocent person having been wrongly involved in cases of such nature could not be ruled out.

Observations of the Courts recorded in judgments *Muhammad Fazil v. State* 1982 PCr.LJ 510; *Abdul Ghaffar v. State* 2005 PCr.LJ 887; *Muhammad Arif v. State* 2006 PCr.LJ 1827 and *Kazim Hussain v. State* 2008 PCr.LJ 971 in regard to deciding cases on basis of evidence alone and not on the basis of sentiments and emotions approved.

Azeem Khan v. Mujahid Khan 2016 SCMR 274 ref.

No matter how heinous the crime, the constitutional guarantee of fair trial (under Article 10A of the Constitution) could not be taken away from the accused. It was, therefore, duty of the court to assess the probative value (weight) of every piece of evidence available on record in accordance with the settled principles of appreciation of evidence, in a dispassionate, systematic and structured manner without being influenced by the nature of the allegations. Any tendency to strain or stretch or haphazardly appreciate evidence to reach a desired or popular decision in a case must be scrupulously avoided or else highly deleterious results seriously affecting proper administration of criminal justice would follow.

State v. Mushtaq Ahmad PLD 1973 SC 418 ref.

(c) Criminal trial---

---Presumption of innocence of accused---Scope---Accused person was presumed to be innocent till the time he was proven guilty beyond reasonable doubt, and this presumption of his innocence continued until

the prosecution succeeded in proving the charge against him beyond reasonable doubt on the basis of legally admissible, confidence inspiring, trustworthy and reliable evidence. [p. 617] F

(d) Constitution of Pakistan---

---Art. 10-A---Right to fair trial---Scope---Principles of fair trial, guaranteed as a Fundamental Right under Art. 10-A of the Constitution, were to be read as an integral part of every sub-constitutional legislative instrument that dealt with determination of civil rights and obligations of, or criminal charge against, any person.

(e) Criminal trial---

---Circumstantial evidence---Standard of care required for relying on circumstantial evidence stated.

Circumstantial evidence may some times be conclusive, but it must always be narrowly examined. In cases that rested entirely on circumstantial evidence, it was of the utmost importance that the circumstances should be ascertained with minute care and caution, before any conclusion or inference adverse to the accused person was drawn. The process of inference and deduction involved in such cases was of a delicate and perplexing character, liable to numerous causes of fallacy. This danger pointed the need for great caution in accepting proof of the facts and circumstances, before they were held to be established for the purpose of drawing inferences therefrom. A mere concurrence of circumstances, some or all of which were supported by defective or inadequate evidence, could create a specious appearance, leading to fallacious inferences. Hence, it was necessary that only such circumstances should be accepted as the basis of inferences that were, on careful examination of the evidence, found to be well-established. A high quality of evidence was, therefore, required to prove the facts and circumstances from which the inference of the guilt of the accused person was to be drawn.

Lejzor Teper v. Queen PLD 1952 PC 117; Fazal Elahi v. Crown PLD 1953 FC 214 and Saeed Ahmad v. Muhammad Irfan PLD 1986 SC 690 ref.

There were chances of fabricating evidence in cases that were based solely on circumstantial evidence; therefore, the court, in such cases, should take extra care and caution to examine the evidence with pure judicial approach on strict legal standards to satisfy itself about its proof, probative value and reliability. When there were apparent indications of possibility of fabricating evidence by the investigating officer in making the case, the court must be watchful against the trap, which may misled to drawing a false inference, and satisfy itself about the fair and genuine collection of such evidence. The failure of the court to observe such care and caution could adversely affect the proper and safe administration of criminal justice.

Hashim Qasim v. State 2017 SCMR 986 and Fayyaz Ahmad v. State 2017 SCMR 2026 ref.

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

---S. 302(b)---Qatl-i-amd---Circumstantial evidence---Approach to determine sufficiency of circumstantial evidence stated.

The settled approach to deal with the question as to sufficiency of circumstantial evidence for conviction of the accused person was that, if, on the facts and circumstances proved, no hypothesis consistent with the innocence of the accused person could be suggested, the case was fit for conviction of the accused person on such conclusion; however, if such facts and circumstances could be reconciled with any reasonable hypothesis compatible with the innocence of the appellant, the case was to be treated one of insufficient evidence, resulting in acquittal of the accused person. Circumstantial evidence, in a murder case, should be like a well-knit chain, one end of which touched the dead body of the deceased and the other the neck of the accused. No link in chain of the circumstances should be broken and the circumstances should be such as cannot be explained away on any reasonable hypothesis other than guilt of accused person. Chain of such facts and circumstances had to be completed to establish guilt of the accused person beyond reasonable doubt and to make the plea of his being innocent incompatible with the weight of evidence against him. Any link missing from the chain broke the whole chain and rendered the same unreliable; in that event, conviction could not be safely recorded, especially on a capital charge. Therefore, if the circumstantial evidence was found not of the said standard and quality, it would be highly unsafe to rely upon the same for conviction; rather, not to rely upon such evidence would a better and a safer course.

Siraj v. Crown PLD 1956 FC 123; Nazir Hossain v. State 1969 SCMR 388; Sairan v. State PLD 1970 SC 56; Karamat Hussain v. State 1972 SCMR 15; Saeed Ahmad v. Muhammad Irfan PLD 1986 SC 690; Barkat Ali v. Karam Elahi 1992 SCMR 1047; Ibrahim v. State 2009 SCMR 407; Muhammad Hussain v. State 2011 SCMR 1127; Imran v. State 2015 SCMR 155 and Azeem Khan v. Mujahid Khan 2016 SCMR 274 ref.

(g) Criminal trial---

---Chance witness, evidence of---Scope---Chance witness was witness who in view of his place of residence or occupation and in the ordinary course of events was not supposed to be present at the place of the occurrence but claimed to be there by chance---Testimony of such witness required cautious scrutiny and was not accepted unless he gave satisfactory explanation of his presence at or near the place of the occurrence at the relevant time.

Javed Ahmad v. State 1978 SCMR 114; Zafar Hayat v. State 1995 SCMR 896; Muhammad Rafique v. State 2004 SCMR 755; Muhammad Khalid v. Abdullah 2008 SCMR 158; Sughra Begum v. Qaiser Pervez 2015 SCMR 1142 and Ibrar Hussain v. State 2020 SCMR 1850 ref.

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

---Ss. 302(b), 392, 452 & 34---Qatl-i-amd, robbery, house trespass, common intention---Reappraisal of evidence---Chance witness, evidence of---Explanation given by the chance witness, who saw the accused persons entering the house of the deceased, was that he happened to pass by in front of the house of the deceased, as he was going from his house to a nearby village for condolence on the death of the father of a person---However, said witness did not mention the name of the person on whose father's death he was going for condolence; nor could he tell the name of the late person on whose death he was going for condolence---Further, his assertion of going for condolence at such odd hours, i.e., about 08:30 p.m., on a winter-night of the month of January did not fit in the customary time of visiting people for condolence on death of someone, in rural areas: people usually made such visits during daytime---Explanation of chance witness of being present before the house of the deceased, at the relevant time was thus found far less than being satisfactory one, and therefore, his testimony could be discarded on such ground alone---Prosecution had failed to complete the chain of circumstances so as to establish conclusively the guilt of the accused persons in a manner that could rule out every hypothesis inconsistent with their innocence---Petition for leave to appeal was converted into appeal and allowed, and the accused persons were acquitted of the charges against them.

(i) Criminal trial---

---Witness---Material improvements made by a witness in his statement---Effect---Deliberate and dishonest improvements made by a witness in his statement to strengthen the prosecution case cast serious doubts on his veracity, and made him untrustworthy and unreliable---Relying on the testimony of such witness was quite unsafe, even on facts deposed by him other than those improvements unless it received corroboration from some other independent piece of reliable evidence.

Hadi Bakhsh v. State PLD 1963 (W. P.) Karachi 805; Shahzada v. Hamidullah 1968 PCr.LJ 176; Amir Zaman v. Mahboob 1985 SCMR 685; Saeed Muhammad v. State 1993 SCMR 550; Khalid Javed v. State 2003 SCMR 1419; Akhtar Ali v. State 2008 SCMR 6; Muhammad Rafique v. State 2010 SCMR 385; Muhammad Saleem v. Muhammad Azan 2011 SCMR 474; Sardar Bibi v. Munir Ahmed 2017 SCMR 344 and 1968 PCr.LJ 176 ref.

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

---Ss. 302(b), 392, 452 & 34---Qatl-i-amd, robbery, house trespass, common intention---Reappraisal of evidence---Material improvements made by a witness in his statement---Effect---Witness who claimed to have seen the accused persons entering the house of the deceased stated to the investigation officer in his statement recorded under S.161, Cr.P.C. that due to darkness he could not recognize the accused persons when he saw them standing at the door of the house of the deceased; but in his statement in court he said that the accused persons were those whom he saw at the door of the deceased---Said witness also stated that there was light, not darkness, at the door of the house of the deceased at that time---Such improvement

made by the witness was very glaring and material---Said witness admitted in his cross-examination that he had not mentioned any identifying features, like age, height, colour of complexion etc., of the persons in his statement to the investigating officer---If the witness had really seen and recognized the persons standing at the door of the deceased, he would definitely have described their identifiable features to the investigating officer, and had he described such recognizable features of those persons, the investigating officer would have conducted the test identification of the accused persons on their arrest in the case---Such deliberate and dishonest improvement made by the witness made him unreliable---Prosecution had failed to complete the chain of circumstances so as to establish conclusively the guilt of the accused persons in a manner that could rule out every hypothesis inconsistent with their innocence---Petition for leave to appeal was converted into appeal and allowed, and the accused persons were acquitted of the charges against them.

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

---Ss. 302(b), 392, 452 & 34---Qatl-i-amd, robbery, house trespass, common intention---Reappraisal of evidence---Recovery of motorcycle allegedly used for reaching the place of occurrence---No specification of the motorcycle, i.e., its make, colour, engine power, or registration number was mentioned in the FIR, therefore, it could not be said with certainty that it was the motorcycle that the chance witness saw with the persons outside the house of the deceased and was mentioned in the FIR---Statement of the investigating officer that the seat-cover of the recovered motorcycle was bloodstained and such fact suggested that it was the same motorcycle that was used in the crime was not found confidence inspiring; had the seat-cover of the motorcycle been really bloodstained, the investigating officer would have sent the same for examination by the Chemical Examiner for ascertaining whether the bloodstain was that of human blood and whether that bloodstain matched with the blood of any of the deceased persons or the accused persons---In absence of the reports of the Chemical Examiner and the Serologist on these facts, the assertion of the investigating officer as to use of the said motorcycle in commission of the crime carried no legal worth---Failure on part of the investigating officer to ascertain registration number and name of the registered owner of the motorcycle was also fatal to his assertion that the recovered motorcycle belonged to one of the accused persons---Non-preparation of the site-map of the place of recovery of motorcycle added further suspicion to the alleged recovery of the motorcycle from the house of one of the accused persons---Recovery of the motorcycle, in view of the said omissions made by the investigating officer, was found completely deficient as an incriminatory piece of circumstantial evidence to connect the accused persons with the commission of the offence---Prosecution had failed to complete the chain of circumstances so as to establish conclusively the guilt of the accused persons in a manner that could rule out every hypothesis inconsistent with their innocence---Petition for leave to appeal was converted into appeal and allowed, and the accused persons were acquitted of the charges against them.

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

---Ss. 302(b), 392, 452 & 34---Qatl-i-amd, robbery, house trespass, common intention---Reappraisal of evidence---Recovery of stolen items on the alleged pointation of accused persons---Investigating officer deposed that during the inspection of the place of occurrence he found empty boxes of jewellery scattered there which indicated the commission of offence of robbery---Prosecution story of interrogation of the accused persons at the place of their arrest (a snooker club) and then leading of the accused persons from the very place of their arrest to the recoveries of the alleged stolen property appeared to be intrinsically doubtful: it did not even fit in with the ordinary human conduct---Accused persons who, as per the prosecution story, were enjoying play snooker in a snooker club, admitted the commission of offence that may entail death penalty forthwith on their arrest, and not only admitted the commission of offence but also cooperated well to lead to the recovery of the stolen property then and there---Such story was very hard to believe for a prudent person---Non-mentioning the alleged fact of finding any scattered jewellery boxes at the place of occurrence in the FIR shook the foundation of the prosecution story---Investigating officer also stated in his examination-in-chief that a crime scene expert was summoned at the spot, who took photographs of the dead bodies and the place of occurrence---All said photographs were available on

record but in none of them were there any scattered empty jewellery boxes---Said photographs, tendered in evidence by the prosecution itself, completely negated the alleged fact of finding scattered empty jewellery boxes at the place of occurrence---Prosecution had failed to complete the chain of circumstances so as to establish conclusively the guilt of the accused persons in a manner that could rule out every hypothesis inconsistent with their innocence---Petition for leave to appeal was converted into appeal and allowed, and the accused persons were acquitted of the charges against them.

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

----S. 392---Robbery---Recovery of alleged stolen property in absence of prior description---Effect---In absence of any description of the stolen property given in the FIR, or in the supplementary statement of the complainant or any witness recorded under S.161, Cr.P.C., prior to the alleged recovery, it could not be said with certainty the recovered property was that which was allegedly stolen.

Observations of the Federal Shariat Court on the issue of recovery of alleged stolen property in absence of prior description made in judgments Noor Ullah v. State 2012 YLR 2618; Changez v. Shahid 2018 MLD 1136 and Tariq Hussain v. State 2018 MLD 1573 approved

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

----Ss. 302(b), 392, 452 & 34---Qatl-i-amd , robbery, house trespass, common intention---Reappraisal of evidence---Recovery of stolen items on the alleged pointation of accused persons---Investigating officer neither got the allegedly stolen laptop and cameras identified from the surviving daughters of the deceased, nor got done forensic audit of these articles from the expert concerned who may have retrieved data therefrom indicating the persons who were in use of these cameras and laptop---Such failure on part of the investigating officer made the recovery of said articles, even if presumed to have been effected from the accused persons, useless for the purpose of crafting any link in the chain of circumstantial evidence against the accused persons to connect them with the commission of offences of robbery and murders---Prosecution had failed to complete the chain of circumstances so as to establish conclusively the guilt of the accused persons in a manner that could rule out every hypothesis inconsistent with their innocence---Petition for leave to appeal was converted into appeal and allowed, and the accused persons were acquitted of the charges against them.

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

----Ss. 302(b), 392, 452 & 34---Qatl-i-amd, robbery, house trespass, common intention---Reappraisal of evidence---Recovery of mobile phones belonging to the deceased persons on the alleged pointation of accused persons---Clear contradiction existed in the oral stance of the investigation officer and the proceedings of recovery reduced into writing by him in the recovery memos, which made the recoveries of mobile phones doubtful---Furthermore it was also not consistent with the normal human conduct that the offenders would have taken the mobiles phones of some of the deceased persons, and had left the mobile phone of one of the deceased laying it on a conspicuous place, i.e., on a table beside the dead body of the said deceased---Non-mentioning the theft of the mobile phones of the deceased persons in the FIR or in the supplementary statement of the complainant, non-joining in investigation the brothers of the accused persons who had allegedly brought the mobile phones to the investigating officer, and not bringing on record their names and the details as to the place from where they got the said mobile phones, all these omissions, also made the alleged recoveries unreliable---Prosecution had failed to complete the chain of circumstances so as to establish conclusively the guilt of the accused persons in a manner that could rule out every hypothesis inconsistent with their innocence---Petition for leave to appeal was converted into appeal and allowed, and the accused persons were acquitted of the charges against them.

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

----Ss. 302(b), 392, 452 & 34---Qatl-i-amd, robbery, house trespass, common intention---Reappraisal of evidence---Recovery of the bloodstained weapons of offence on the alleged pointation of accused persons--Both the witnesses associated during recovery proceedings were close relatives of the complainant and astonishingly they reached the police station at the time when the investigating officer planned to make a raid for arrest of the accused persons and also when the accused persons were ready to cooperate for making

recoveries during investigation---Prosecution story became further doubtful as particulars of said witnesses were written on the recovery-memos in handwriting patently different from all other writings thereon; it indicated that the particulars of the witnesses were added and their signatures obtained subsequently on the already prepared recovery memos---As per version of the investigating officer, there were 7/8 shops and two villages near the place of alleged recoveries, but no person from those nearby shops and villages was associated in the recovery-proceedings---Although it was a fact that the persons from the general public usually did not come forward to be witness to such police proceedings, but the assertion of the investigating officer that no person of the locality other than the said witnesses was there to see the proceedings that allegedly continued for about three hours of the day made the proceedings further doubtful---Story of wrapping up bloodstained knives, the alleged weapons of offence and gloves into polythene shopper bags and then burying them in the ground close to a water stream by the offenders, for a future recovery therefrom, instead of throwing them into that water stream or a nearby river also did not appeal to a prudent mind---Prosecution had failed to complete the chain of circumstances so as to establish conclusively the guilt of the accused persons in a manner that could rule out every hypothesis inconsistent with their innocence---Petition for leave to appeal was converted into appeal and allowed, and the accused persons were acquitted of the charges against them.

2017 SCMR 344 and 2017 SCMR 486 ref.

(q) Criminal trial---

---Recovery---Recovery of weapon of offence--- Corroborative evidence---Scope---Recovery of weapon of offence was only a corroborative piece of evidence; and in absence of substantive evidence, it was not considered sufficient to hold the accused person guilty of the offence charged---When substantive evidence failed to connect the accused person with the commission of offence or was disbelieved, corroborative evidence was of no help to the prosecution as the corroborative evidence could not by itself prove the prosecution case.

Saifullah v. State 1985 SCMR 410; Ali Muhammad v. Bashir Ahmed 2003 SCMR 868; Israr-ul-Haq v. Muhammad Fayyaz 2007 SCMR 1427; Hayatullah v. State 2018 SCMR 2092; PLD 1956 FC 123 and 1985 SCMR 410 ref.

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

---Ss. 302(b), 392, 452 & 34---Qatl-i-amd, robbery, house trespass, common intention---Reappraisal of evidence---Recovery of the bloodstained knives (churri) on the alleged pointation of accused persons---Such recovery, without a positive forensic report matching the blood found thereon with that of the deceased, could not be considered as a substantive or corroborative piece of evidence against the accused persons to connect them with the commission of offence---Prosecution had failed to complete the chain of circumstances so as to establish conclusively the guilt of the accused persons---Petition for leave to appeal was converted into appeal and allowed, and the accused persons were acquitted of the charges against them.

2015 SCMR 840; 2003 SCMR 1419; 2011 SCMR 1233 and 2017 SCMR 486 ref.

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

---S. 302(b)---Qatl-i-amd---Medical evidence---Scope---Medical evidence was in the nature of supporting, confirmatory or explanatory of the direct or circumstantial evidence, and was not "corroborative evidence" in the sense the term was used in legal parlance for a piece of evidence that itself also had some probative force to connect the accused person with the commission of offence---Medical evidence by itself did not throw any light on the identity of the offender---Such evidence may confirm the available substantive evidence with regard to certain facts including seat of the injury, nature of the injury, cause of the death, kind of the weapon used in the occurrence, duration between the injuries and the death, and presence of an injured witness or the injured accused at the place of occurrence, but it did not connect the accused with the commission of the offence---Medical evidence could not constitute corroboration for proving involvement of the accused person in the commission of offence, as it did not establish the identity of the accused person.

Yaqoob Shah v. State PLD 1976 SC 53; Machia v. State PLD 1976 SC 695; Muhammad Iqbal v. Abid Hussain 1994 SCMR 1928; Mehmood Ahmad v. State 1995 SCMR 127; Muhammad Sharif v. State 1997 SCMR 866; Dildar Hussain v. Muhammad Afzaal PLD 2004 SC 663; Iftikhar Hussain v. State 2004 SCMR 1185; Sikandar v. State 2006 SCMR 1786; Ghulam Murtaza v. Muhammad Akram 2007 SCMR 1549; Altaf Hussain v. Fakhar Hussain 2008 SCMR 1103 and Hashim Qasim v. State 2017 SCMR 986 ref.

(t) Criminal trial---

---Conviction---Conjectures and probabilities---Not the substitute of proof---In criminal cases finding of guilt against an accused person could not be based merely on the high probabilities that may be inferred from evidence in a given case---Accused person could not be convicted on the basis of mere "suspicion" or "probability" unless and until the charge against him was "proved beyond reasonable doubt"---Finding as regards guilt should be rested surely and firmly on the evidence produced in the case and the plain inferences of guilt that may irresistibly be drawn from that evidence---Mere conjectures and probabilities could not take the place of proof---If a case was decided merely on high probabilities regarding the existence or nonexistence of a fact to prove the guilt of a person, the golden rule of giving "benefit of doubt" to an accused person, which was a dominant feature of the administration of criminal justice would be reduced to a naught.

Muhammad Luqman v. State PLD 1970 SC 10 ref.

(u) Criminal trial---

---Prosecution---Standard of proof--- Scope--- Benefit of doubt---Scope---Prosecution was under the obligation to prove its case against the accused person at the standard of proof required in criminal cases, namely, beyond reasonable doubt standard, and could not be said to have discharged this obligation by producing evidence that merely met the preponderance of probability standard applied in civil cases---If the prosecution failed to discharge its said obligation and there remained a reasonable doubt, not an imaginary or artificial doubt, as to the guilt of the accused person, the benefit of that doubt was to be given to the accused person as of right, not as of concession.

Tariq Pervez v. State 1995 SCMR 1345 ref.

Syed Rifaqat Hussain Shah, Advocate-on-Record for Petitioners.

Nemo for the Complainant.

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

Date of hearing: 7th December, 2020.

JUDGMENT

SYED MANSOOR ALI SHAH, J.---On January 21, 2010 Parvez Akhtar, a retired WAPDA employee, his wife Firdous Kausar, his daughters Ghazala and Bushra and his granddaughter Zarmina were mercilessly murdered in their house, their throats slit open by a sharp edged weapon. One Mirza Muhammad Umar told the complainant, Mobeen Akhtar, the brother of the deceased Pervaiz Akhtar, that a night before at about 08:30 p.m. he had seen three persons with a motorcycle outside the house of Pervaiz Akhtar. Mobeen Akhtar reported these facts to the Police and that apparently his deceased brother had no enmity with anyone. First information report (FIR)¹ of the tragic incident was recorded with these brief facts. Mirza Muhammad Umar, in his statement to the Police, narrated that he could not recognize those three persons as there was darkness in the street at that time. During investigation, the investigating officer suspected it to be a robbery that ended with five brutal murders.

2. On January 24, 2010 one Fazal Karim² told the Police that in the evening of January 20, 2010 he had seen Qadeer Ahmad, the son-in-law of the deceased Pervaiz Akhtar, along with two other boys going towards Dhok Tama (the locality where the house of the deceased Pervaiz Akhtar was situate) on a motorcycle. The Police arrested Qadeer Ahmad, Khurram Shahzad and Naveed Asghar ("petitioners") on January 31, 2010 and recovered two bloodstained knives (the alleged weapons of offence), a motorcycle (allegedly used by the accused persons for coming to the place of occurrence), mobile phones, a laptop, three cameras, an amount of cash amount, gold ornaments and some Defence Saving Certificates (the alleged looted property). An application was made for recording confessional statement of the accused,

Naveed Asghar, but it was turned down by the Magistrate with the observation that the accused appeared to be under pressure of the Police.

3. With the said incriminating material, the petitioners were sent up for trial. The learned trial court convicted them, vide its judgment dated 22.01.2011, for the offences of house trespass, robbery and murder, and sentenced each of them to three years rigorous imprisonment with fine of Rs.10,000/- under section 452, of the Pakistan Penal Code, 1860 ("P.P.C."); five years rigorous imprisonment with fine of Rs.10,000/- under section 392, P.P.C.; and death on five counts under section 302(b), P.P.C. read with section 34, P.P.C. Each of them was also directed to pay compensation of Rs.100,000/- to the legal heirs of the deceased persons, under section 544-A, Cr.P.C. The High Court dismissed the jail-appeal filed by the petitioners and confirmed the death sentence, vide its judgment dated 12.02.2016. Hence, this jail petition is filed by the petitioners for leave to appeal.

4. The main contentions of the learned counsel for the petitioners are that: the occurrence was unseen and the petitioners has falsely been involved in the case; the circumstantial evidence produced by the prosecution is totally insufficient to connect the petitioners with the commission of offences; the learned courts below have wrongly relied upon the incredible testimony of Muhammad Umar (PW-13) and fake recoveries of alleged weapons of offence and looted property; and, the High Court has not appreciated the prosecution-evidence in depth and has referred to the prosecution-evidence in a cursory and casual manner for confirmation of death sentence. Learned counsel for the State, on the other hand, has supported the judgments of the courts below, which according to him are well-reasoned and therefore do not merit interference.

5. Submissions of the counsel for the parties and examination of the record of the case with their able assistance give rise to the following points of law for our consideration: what is the nature, scope and extent of reappraisal of evidence by the High Court while hearing an appeal and a reference sent by the trial court for confirmation of the death sentence; whether it was necessary to complete the chain of the circumstantial evidence in order to connect the accused with the commission of the offence; whether reliance could be placed on a testimony of a witness who made improvements in his statement; whether recovery of the alleged stolen property without their prior identification or in absence of any proof that they were owned by the deceased persons could connect the accused with the commission of offence; whether recovery of the alleged weapons of offence, viz, bloodstained knives, without a positive forensic report as to matching the bloodstains found thereon with the blood of any of the deceased persons could connect the accused with the commission of offence; and, whether medical evidence, viz, postmortem reports etc., could corroborate the other prosecution evidence against the petitioners.

Reappraisal of evidence by the High Court in deciding the appeal and the reference for confirmation of death sentence

6. Normally, the High Courts hear and decide the appeal filed by the convicted person and the reference sent by the trial court for confirmation of the death sentence, together. It has been noticed that while doing so the learned Judges of the High Courts sometimes, as it appears to have done in the present case, remain content with examining and deciding only the arguments and contentions advanced in appeal, and do not by themselves scrutinize the whole material available on record of the case. Apart from deciding those arguments and contentions, it is incumbent upon the High Courts, in discharge of their statutory duty under sections 375 and 376 of the Code of Criminal Procedure, 1898 ("Cr.P.C."), to read and appraise each and every piece of evidence, and to examine also whether any evidence has been improperly admitted or excluded, or has been misread or non-read by the trial court. Even non-filing of appeal or withdrawal of appeal by the convicted person,³ or any concessional statement by the state counsel⁴ does not relieve the High Court from performing its duty of reappraising the whole evidence available on record. Ordinarily, in a criminal appeal against conviction, the appellate Court, under section 423 of the Cr.P.C., can dismiss the appeal if the court is of the opinion that there is no sufficient ground for interference, after examining all the grounds urged before it for challenging the correctness of the decision given by the trial court. It is not necessary for the appellate court to examine the entire record for the purpose of arriving at an

independent decision of its own whether the conviction of the appellant is fully justified. The position is, however, different where the appeal is by an accused who is sentenced to death, so that the High Court dealing with the appeal has before it, simultaneously with the appeal, a reference for confirmation of the capital sentence under section 374 of the Cr.P.C. On a reference for confirmation of sentence of death, the High Court is required to proceed in accordance with sections 375 and 376 of the Cr.P.C. and the provisions of these sections make it clear that the duty of the High Court, in dealing with the reference, is not only to see whether the order passed by the trial court is correct, but to examine the case for itself and even direct a further enquiry or the taking of additional evidence if the Court considers it desirable in order to ascertain the guilt or the innocence of the convicted person.⁵

7. Section 374 of the Cr.P.C. provides that when the Court of Session passes sentence of death, the proceedings shall be submitted to the High Court and the sentence shall not be executed unless it is confirmed by the High Court. As the death sentence passed by the trial court, i.e., the Court of Session, cannot be executed without being it confirmed by the High Court, proceedings before the High Court on reference under section 374, Cr.P.C. is yet another tier of judicial assessment of the evidence to examine "any point bearing upon the guilt or innocence of the convicted person." The High Court has been given very wide powers to prevent any possible miscarriage of justice. The proceedings are a reappraisal and reassessment of the entire facts of the case and of the law applicable. This extensive power actually casts an onerous duty on the High Court to ensure safe administration of criminal justice by considering in the reference proceedings all aspects of the case and coming to an independent conclusion, apart from the view expressed by the Court of Session. The High Court has to decide on reappraisal of the whole evidence whether the conviction is justified and, having regard to the circumstances of the case, whether the sentence of death is appropriate.⁶

8. As back as in the year 1921, Madgaonkar, A.J.C., while exploring the scope of power of High Court in confirmation proceedings under section 374 in the case of *Gul v. Empror*,⁷ observed that the worth and sanctity of human life are a test and mark of civilized societies, and are increasingly reflected in the criminal jurisprudence. The Legislature has provided, he noted, in confirmation proceedings a final safeguard and has laid this duty upon the High Court. The duty of judgment is laid in the first instance upon the trial Judge. But equally and with all that weight, the High Court in confirmation proceedings must finally weigh for itself the whole evidence, and is to confirm the conviction and sentence or make any other order according to its own final conclusion on the guilt or innocence of the sentenced person in the discharge of the duty laid upon it by law. These significant observations of the learned Judge become more nuanced when viewed in the constitutional context. Right to life and liberty, right to fair trial and right to dignity are fundamental rights guaranteed under Articles 9, 10A and 14 of the Constitution. The importance of human life goes to the heart of these fundamental rights, the rigorous two-tiered process of appraisal, assessment and examination under section 374, Cr.P.C. also meets the test of these fundamental rights. The duty cast on the High Court in deciding a murder reference under section 374, Cr.P.C. is a heavy one and can only be discharged once the entire evidence is reappraised to fully exhaust all the points having a bearing upon the guilt or innocence of the convicted person.

9. The High Court, in the present case, has made only a general and cursory reference to the prosecution evidence in its judgment, and has failed to reappraise it thoroughly. In such a situation, we would have ordinarily remanded the matter to the High Court to hear and decide the case afresh, but in the present case much water has flown under the bridge. Remand will entail further delay and hardship, besides, the points of law noted above also require a clear determination by this Court. We, therefore, decided to answer those points of law and to reappraise the prosecution evidence ourselves for safe administration of criminal justice.

Heinous nature of allegations and appraisal of evidence

10. The ruthless and ghastly murder of five persons is a crime of heinous nature; but the frightful nature of crime should not blur the eyes of justice, allowing emotions triggered by the horrifying nature of the offence to prejudge the accused. Cases are to be decided on the basis of evidence and evidence alone and

not on the basis of sentiments and emotions.⁸ Gruesome, heinous or brutal nature of the offence may be relevant at the stage of awarding suitable punishment after conviction; but it is totally irrelevant at the stage of appraising or reappraising the evidence available on record to determine guilt of the accused person, as possibility of an innocent person having been wrongly involved in cases of such nature cannot be ruled out.⁹ An accused person is presumed to be innocent till the time he is proven guilty beyond reasonable doubt, and this presumption of his innocence continues until the prosecution succeeds in proving the charge against him beyond reasonable doubt on the basis of legally admissible, confidence inspiring, trustworthy and reliable evidence. No matter how heinous the crime, the constitutional guarantee of fair trial under Article 10A cannot be taken away from the accused. It is, therefore, duty of the court to assess the probative value (weight) of every piece of evidence available on record in accordance with the settled principles of appreciation of evidence, in a dispassionate, systematic and structured manner without being influenced by the nature of the allegations. Any tendency to strain or stretch or haphazardly appreciate evidence to reach a desired or popular decision in a case must be scrupulously avoided or else highly deleterious results seriously affecting proper administration of criminal justice will follow.¹⁰ It may be pertinent to underline here that the principles of fair trial have now been guaranteed as a Fundamental Right under Article 10-A of the Constitution and are to be read as an integral part of every sub-constitutional legislative instrument that deals with determination of civil rights and obligations of, or criminal charge against, any person.

Standard of care required for relying on circumstantial evidence

11. The occurrence in the present case is unseen one, and the case of the prosecution against the petitioners is wholly based on the following circumstantial evidence: (i) last seen evidence of Mirza Muhammad Umar (PW-13); (ii) recovery of a motorcycle allegedly used for reaching the place of occurrence; (iii) recovery of the alleged stolen property; (iv) recovery of the alleged bloodstained weapons of offence and gloves; and (v) medical evidence as to post-mortem examination of the deceased persons. Before examining the said circumstantial evidence, we think it necessary to state the standard of care required for relying on circumstantial evidence and the approach to determine sufficiency of such evidence for reaching the conclusion of guilt of an accused person.

12. Circumstantial evidence may sometimes be conclusive, but it must always be narrowly examined. In cases like the present one that rest entirely on circumstantial evidence, it is of the utmost importance that the circumstances should be ascertained with minute care and caution, before any conclusion or inference adverse to the accused person is drawn. The process of inference and deduction involved in such cases is of a delicate and perplexing character, liable to numerous causes of fallacy. This danger points the need for great caution in accepting proof of the facts and circumstances, before they are held to be established for the purpose of drawing inferences therefrom. A mere concurrence of circumstances, some or all of which are supported by defective or inadequate evidence, can create a specious appearance, leading to fallacious inferences. Hence, it is necessary that only such circumstances should be accepted as the basis of inferences that are, on careful examination of the evidence, found to be well-established. A high quality of evidence is, therefore, required to prove the facts and circumstances from which the inference of the guilt of the accused person is to be drawn.¹¹

13. There are chances of fabricating evidence in cases that are based solely on circumstantial evidence; therefore, the court, in such cases, should take extra care and caution to examine the evidence with pure judicial approach on strict legal standards to satisfy itself about its proof, probative value and reliability. When there are apparent indications of possibility of fabricating evidence by the investigating officer in making the case, the court must be watchful against the trap, which may misled to drawing a false inference, and satisfy itself about the fair and genuine collection of such evidence. The failure of the court to observe such care and caution can adversely affect the proper and safe administration of criminal justice.¹²

Approach to determine sufficiency of circumstantial evidence

14. The settled approach to deal with the question as to sufficiency of circumstantial evidence for conviction of the accused person is this: If, on the facts and circumstances proved, no hypothesis consistent

with the innocence of the accused person can be suggested, the case is fit for conviction of the accused person on such conclusion; however, if such facts and circumstances can be reconciled with any reasonable hypothesis compatible with the innocence of the appellant, the case is to be treated one of insufficient evidence, resulting in acquittal of the accused person.¹³ Circumstantial evidence, in a murder case, should be like a well-knit chain, one end of which touches the dead body of the deceased and the other the neck of the accused. No link in chain of the circumstances should be broken and the circumstances should be such as cannot be explained away on any reasonable hypothesis other than guilt of accused person. Chain of such facts and circumstances has to be completed to establish guilt of the accused person beyond reasonable doubt and to make the plea of his being innocent incompatible with the weight of evidence against him. Any link missing from the chain breaks the whole chain and renders the same unreliable; in that event, conviction cannot be safely recorded, especially on a capital charge.¹⁴ Therefore, if the circumstantial evidence is found not of the said standard and quality, it will be highly unsafe to rely upon the same for conviction; rather, not to rely upon such evidence will a better and a safer course.¹⁵

Last seen evidence of Mirza Muhammad Umar (PW-13)

15. In the present case, the first link in the chain of circumstantial evidence relied upon by the prosecution is the last seen evidence of Mirza Muhammad Umar (PW-13). The said witness while appearing in the witness-box deposed that on 20.01.2010 at about 08:00 or 08:30 p.m. he was passing by in front of the house of the deceased, Pervaiz Akhtar. He saw three persons there who had worn shawls (Chaddar) over themselves. A motorcycle High Speed 70 was also parked there. The said three persons knocked the door of house of the deceased, Pervaiz Akhtar. The door was opened, and the said three persons went inside the house along with the motorcycle. He further stated that the three accused persons present in the court were the same persons. This was his statement made in examination-in-chief. He explained in cross-examination that on 20.01.2010 when he happened to pass by in front of the house of the deceased, Pervaiz Akhtar, he was going from his house to "Wattay di Dari" for condolence on the death of the father of some person known to him. He stated that he did not know the name of the person on whose death he went to condole. He denied the suggestion put to him that he did not know the name of that deceased person because no such death had taken place. He stated that the village "Wattay di Dari" was at a distance of about one kilometer from his house. On questioning about identification of the accused person, he explained that the accused person though had put on shawls (Chaddar) at that time but their faces were visible. There was light, not darkness, at that time in front of the house of the deceased, Pervaiz Akhtar. He had not mentioned the names of the accused persons in his statement to the police. He did not know the names of the accused person at that time. He had not mentioned the description, the age and colour of the complexion, of the accused person to the police. He was specifically asked, which he denied, that in his statement before the police he had mentioned that because of darkness he could not identify the accused persons. Then, he was duly confronted with his statement (Exh-DE) made to the investigating officer under section 161, Cr.P.C., and it was noted by the trial court that it was so recorded in that statement. Then, he denied the suggestion put to him that he had deposed about identification of the accused persons only on instruction of the prosecution.

16. Reading of the statement of Mirza Muhammad Umar (PW-13) shows that he is a chance witness: a witness who in view of his place of residence or occupation and in the ordinary course of events is not supposed to be present at the place of the occurrence but claims to be there by chance. Testimony of such witness requires cautious scrutiny and is not accepted unless he gives satisfactory explanation of his presence at or near the place of the occurrence at the relevant time.¹⁶ The explanation of Mirza Muhammad Umar (PW-13) is that he happened to pass by in front of the house of the deceased, Pervaiz Akhtar, as he was going from his house to "Wattay di Dari" for condolence on the death of the father of some person known to him. He, however, did not mention the name of the person known to him on whose father's death he was going for condolence; nor could he tell the name of the late person on whose death he was going for condolence. Further, his assertion of going for condolence at such odd hours, i.e., about 08:30 p.m., on a winter-night of the month January does not fit in the customary time of visiting people for condolence

on death of someone, in rural areas: people usually make such visits during daytime. His explanation of being present before the house of the deceased, Pervaiz Akhtar, at the relevant time is thus found far less than being satisfactory one. His testimony may be discarded on this ground alone. But there is another solid reason also that makes him unreliable: a very material improvement made by him in his testimony as to recognizing the accused persons at the time of seeing them in the night of the occurrence and identifying them at the time of making his statement in court.

Effect of material improvements made by a witness

17. Deliberate and dishonest improvements made by a witness in his statement to strengthen the prosecution case cast serious doubts on his veracity, and makes him untrustworthy and unreliable. It is quite unsafe to rely on testimony of such witness, even on facts deposed by him other than those improvements unless it receives corroboration from some other independent piece of reliable evidence.¹⁷ In the case of *Shahzada v. Hamidullah*,¹⁸ a five-member Bench of this Court, on appraising the evidence of a witness, found that he had improved upon the version he had earlier given to the police while making statement in Court, and upon such finding held that the improvement had affected his veracity rendering it unsafe to rely upon his evidence. Hamoodur Rahman, J., speaking for the Bench observed: "[The witness] also tried to improve upon the version he earlier gave to the police by introducing the story of his having seen the [accused] respondent Hamidullah actually loading his gun in the middle of the bazar. In his police statement he had only stated that when he saw Hamidullah first he appeared to be proceeding to the shop of the deceased to purchase snuff. This definite attempt at embellishment clearly affected his veracity and rendered it unsafe to rely upon his evidence." In the case of *Akhtar Ali v. State*¹⁹ the complaint initially made statement that four unknown persons had committed the offence and did not name any person therein, but subsequently nominated the accused persons in his supplementary statement despite the fact that one of the accused person was already known to him. A four-member Bench of this Court, which heard the case, noted with concern that improvement made by the complaint even during investigation and discarded his testimony making the observations that "when a witness improves his version to strengthen the prosecution case, his improved statement subsequently made cannot be relied upon as the witness has improved his statement dishonestly, therefore, his credibility becomes doubtful."

18. Mirza Muhammad Umar (PW-13) stated to the investigation officer in his statement (Ex-DE) recorded under section 161, Cr.P.C. that due to darkness he could not recognize the accused persons when he saw them standing at the door of the house of the deceased, Pervaiz Akhtar; but in his statement in court he said that the accused persons were those whom he saw at the door of the deceased, Pervaiz Akhtar. He stated also that there was light, not darkness, at the door of the house of the deceased, Pervaiz Akhtar at that time. This was a very glaring and material improvement made by the witness. He admitted in cross-examination that he had not mentioned any identifying features, like age, height, colour of their complexion etc., of those persons in his that statement. If he had really seen and recognized the persons standing at the door of the deceased, Pervaiz Akhtar, he would definitely have described their identifiable features to the investigating officer. And had he described such recognizable features of those persons, the investigating officer would have got conducted the test identification of the accused persons on their arrest in the case. This deliberate and dishonest improvement made by the witness makes him unreliable. The observation of the High Court that the value of his testimony is not diminished despite the said improvement is totally flawed and untenable.

Recovery of motorcycle allegedly used for reaching the place of occurrence

19. The second incriminatory circumstantial evidence relied upon by the prosecution is the recovery of a motorcycle, Speed Smart CD SR-70, that is alleged to have been used by the petitioners for reaching the place of occurrence. Sub-Inspector Fazal Hussain, the investigating officer, appeared in the witness-box as PW-16. About the said recovery, he stated that on 27.01.2010 he raided the house of the accused Qadeer at Langurpur Baily. The accused Qadeer was not found there. One Bashir, the brother of the accused Qadeer, met there and led to the recovery of the motorcycle from his house. Bloodstains were found present on the seat-cover of the motorcycle. He took the motorcycle into his possession vide recovery-memo (Exh-

PR), which was owned by the accused Khurram Shahzad. In cross-examination, he explained that the semi-washed bloodstains on the seat-cover of the motorcycle suggested use of the said motorcycle in the commission of crime. He admitted that he did not send the bloodstained part of the seat of the motorcycle for examination to the Chemical Examiner. He denied the suggestion that there were no bloodstains on the seat of the motorcycle. He stated that on 27.01.2010 he had no proof of ownership of the motorcycle; Bashir, brother of the accused Qadeer, told him that motorcycle was of the accused Khurram Shahzad. He admitted that throughout the investigation he did not collect any proof as to ownership of the motorcycle. He also admitted that he did not prepare the site-plan of the place from which the motorcycle was recovered. He denied the suggestion that the site-plan was not prepared as the motorcycle was not recovered from the house of the accused Qadeer in village Langarpur Baily. The recovery witness, Waheed Ahmad, 459/c (PW-9) made similar statement as to proceedings of the recovery of the motorcycle.

20. By close examination of the prosecution-evidence as to the recovery of that motorcycle as well as the assertion that the same was used in commission of the crime, we have noticed that no specification of the motorcycle, i.e., its make, colour, power-70, 100 or 125, or registration number was mentioned in the FIR. Therefore, it cannot be said with certainty that it is the motorcycle that Mirza Muhammad Umar (PW-13) saw with the persons outside the house of the deceased Pervaiz Akhtar and was mentioned in the FIR. The statement of the investigating officer (PW-16) that the seat-cover of the recovered motorcycle was bloodstained and this fact suggested that it was the same motorcycle that was used in the crime is not found confidence-inspiring; had the seat-cover of the motorcycle been really bloodstained, the investigating officer would have sent the same for examination by the Chemical Examiner for ascertaining whether the bloodstain is that of human blood and whether that bloodstain matches with the blood of any of the deceased persons or the accused persons. In absence of the reports of the Chemical Examiner and the Serologist on these facts, the assertion of the investigating officer as to use of the said motorcycle in commission of the crime carries no legal worth. The failure on part of the investigating officer to ascertain registration number and name of the registered owner of the motorcycle is also fatal to his assertion that the recovered motorcycle is of the accused Khurram Shahzad. He stated that Bashir brother of the accused Qadeer told him that the motorcycle was of the accused Khurram Shahzad; but neither the statement of the said Bashir to this effect was recorded in the course of investigation under section 161, Cr.P.C. nor was he examined as a witness during trial about the alleged ownership of the accused Khurram Shahzad as well as about the alleged recovery of the motorcycle on his pointation from the house of the accused Qadeer. The non-preparation of the site-map of the place of recovery of motorcycle adds further suspicion to the alleged recovery of the motorcycle from the house of the accused Qadeer. The recovery of the motorcycle, in view of the said omissions made by the investigating officer, is found completely deficient as an incriminatory piece of circumstantial evidence to connect the accused Qadeer or the accused Khurram Shahzad with the commission of the offence.

Recovery of gold ornaments etc alleged to be stolen property

21. Recovery of the alleged stolen or looted property is the third link that the prosecution tried to join in the chain of circumstantial evidence. Sub-Inspector Fazal Hussain, the Investigating Officer, (PW-16) deposed that during the inspection of the place of occurrence he found empty boxes of jewellery scattered there which indicated the commission of offence of robbery; therefore, he also added section 392, P.P.C. to the crime report. He arrested the accused persons, Khurram Shahzad, Qadeer and Naveed, on 31.01.2010, in a raid made at a snooker club in village Pakwal. On interrogation, the accused persons made disclosure that they could lead to recoveries. Firstly, the accused Qadeer led him to the recovery of gold bangles, gold rings, gold locket, five currency notes of Rs. 1000, four currency notes of Rs. 5000 and two Defence Saving Certificates of the deceased Pervaiz Akhtar, from his rented house situated in village Pakwal. Thereafter, the accused Khurram Shahzad led to the recovery of gold bangles, gold ring, gold ear ring, gold chain, fourteen currency notes of Rs.500, three Defence Saving Certificates, one laptop, one movie camera and two still cameras, from his house situated in village Aima Ilyas. Then the accused Naveed led to the recovery of gold ring, pair of ear rings, pair of ear topes, fourteen currency notes of

Rs.500, one Defence Saving Certificate, from his house situated in village Jandal. He took the said recovered things into his possession, and prepared their recovery-memos and site-plans of the places of recovery. In cross-examination, he admitted that the fact of finding scattered empty boxes of jewellery at the place of occurrence was not mentioned in the FIR, and he did not take any such empty box into his possession. About interrogation of the accused person and recoveries, he explained that he interrogated the accused persons outside the snooker club for about one hour. From the snooker club they first went to the house of the accused Qadeer. The accused Qadeer got key of the main gate of the house from an old lady and then opened the gate. He admitted that he did not mention this fact in the case dairy that the accused Qadeer opened the gate by obtaining key from an old lady. He denied the suggestion that the accused Qadeer had not hired any house, nor was any recovery made on his pointation. About the recovery made from the house of the accused Khurram Shahzad, he stated that nobody was present in the house of the accused Khurram Shahzad; however, one woman came there and opened the lock of the door. He admitted that he did not record statement of the said woman. As to the recovery from the house of the accused Naveed Asghar, he said that four or five women were there in the house of the accused Naveed Asghar when they reached there. He stated that he did not join any person from the locality in the recovery proceedings. He denied the suggestion that the whole recovery proceedings were recorded fictitiously by him while sitting in the police station, and that the accused persons were already in police custody and their arrest was fictitiously shown to have been made on 31.01.2010. The recovery-witness, Tahir Akhtar (PW-11) who is cousin of the complainant made statement supporting the due conduct of the recovery proceedings, in his examination-in-chief. He, however, could not tell the time when the recoveries were made from the houses of the accused persons, Qadeer, Khurram Shahzad and Naveed Asghar. He denied the suggestion that recoveries were planted on the accused persons and nothing was recovered from them.

22. It may be said straight away without any deep deliberation that the prosecution story of interrogation of the accused persons at the place of their arrest and then leading of the accused persons from the very place of their arrest to the recoveries of the alleged stolen property appears to be intrinsically doubtful: it does not even fit in with the ordinary human conduct. The accused persons who, as per the prosecution story, were enjoying play snooker in a snooker club, admitted the commission of offence that may entail death penalty forthwith on their arrest, and not only admitted the commission of offence but also cooperated well to lead to the recovery of the stolen property then and there. It is very hard for a prudent person to believe such story. Non-mentioning the alleged fact of finding any scattered jewellery boxes at the place of occurrence in the FIR shakes the foundation of the story. Fazal Hussain, SI (PW-16) also stated in his examination-in-chief that crime scene expert Masood Ahmad was summoned at the spot, who took photographs of the dead bodies and the place of occurrence. Masood Ahmad appeared in the witness-box as PW-7, and tendered the photographs of the deceased persons in evidence as Exh-P 1 to P5 and the photographs of the crime scene as Exh-P6 to P10. All these photographs are available on record of the case. In none of the photographs there are any scattered empty jewellery boxes. These photographs, tendered in evidence by the prosecution itself, completely negate the alleged fact of finding scattered empty jewellery boxes at the place of occurrence.

23. It was denied on behalf of the accused Qadeer by putting suggestion in cross-examination to the investigating officer (PW-16) in the terms that the accused Qadeer had not hired any house. The investigating officer did not join in investigation the landlord of that alleged rented house to bring on record the facts when the accused Qadeer had got the house on rent from him, especially when as per its own version of the prosecution the accused Qadeer was resident of the village, Langurpur Baily, from where the investigating officer recovered the motorcycle allegedly used for reaching the place of occurrence. Further, not associating the women in investigation, who brought the keys of the houses of the accused persons Qadeer and Khurram Shahzad, and even non-mentioning their names in the case dairy create dent in the story of recoveries.

Recovery of alleged stolen property in absence of prior description

24. Even otherwise, in absence of any description of the stolen property given in the FIR, or in the supplementary statement of the complainant or any witness recorded under section 161, Cr.P.C., prior to the alleged recovery, it cannot be said with certainty the recovered property is that which was allegedly stolen.²⁰ The recovered jewellery, the alleged stolen property, has been attempted to be identified and proved as the one belonging to the deceased Pervaiz Akhtar by the testimony of the goldsmith, Mehmood Ahmad (PW-12). The said witness (PW-12) stated in his examination-in-chief that he identified the gold ornaments produced before him by the investigating officer in the police station. The said gold ornaments were got prepared from him by the deceased Pervaiz Akhtar. On 07.08.2008, the deceased Pervaiz Akhtar got repaired the said gold ornaments from him, and he had issued the receipt (Exh-PPP) at the time of receiving the gold ornaments for repair. In cross-examination, he said that the receipt (Exh-PPP) was not produced by him to the investigating officer. Record of the case is silent from where the said receipt was found by the investigating officer, or who tendered it to him. The goldsmith, Mehmood Ahmad (PW-12), did not state the date when the deceased Pervaiz Akhtar had purchased the said gold ornaments from him. He did not produce any receipt book of his shop showing any entry of sale of gold ornaments to the deceased Pervaiz Akhtar, nor did he bring with him, at the time of his testimony in court, the receipt book containing the entry of receiving the gold ornaments from the deceased Pervaiz Akhtar for repair. His testimony is therefore of little value to prove that the gold ornaments allegedly recovered from the accused persons really belong to the deceased Pervaiz Akhtar. Tahir Akhtar (PW11), the witness to the alleged recoveries, who is the cousin of the complainant and of the deceased Pervaiz Akhtar said in his cross-examination that the deceased Pervaiz Akhtar had five daughters. Two daughters of the deceased Pervaiz were killed in the incident of the present case, but the remaining three daughters would have been the best persons to identify the gold ornaments. If these ornaments had really belonged to their deceased father Pervaiz Akhtar, they must have been in use of their deceased mother or their deceased sisters and they would definitely have seen those ornaments in their use. Similar is the position with the identification of laptop and cameras, the alleged stolen articles. The investigating officer neither got them identified from the daughters of the deceased Pervaiz Akhtar, nor got done forensic audit of these articles from the expert concerned who may have retrieved data therefrom indicating the person who were in use of these cameras and laptop. Such failure on part of the investigating officer makes the recovery of these articles, even if presumed to have been effected from the accused persons, useless for the purpose of crafting any link in the chain of circumstantial evidence against the petitioners to connect them with the commission of offences of robbery and murders.

Recovery of mobile phones and sims

25. As to the alleged recovery of the mobile phones of the deceased persons Bushra, Ghazal and Zarmina, Fazal Hussain, SI, (PW-16) deposed that on 02.02.2010 after making recoveries of the alleged weapon of offences at Manara Pulley the accused Naveed Asghar produced the mobile phone of the deceased Bushra by sending for the same from his house through his brother, and at the same place the accused person Khurram Shahzad also produced two mobile phones of the deceased persons, Zarmina and Ghazala by calling the same through his brother. He further stated that he took the said mobile phones into his possession vide recovery-memos, Exh-PLL and Exh-PNN. In cross-examination, he admitted that he did not mention the fact of calling the mobile phones by the accused persons at Manara Pulley from their houses through some third persons. He admitted that the persons through whom the accused persons had sent for the mobile phones were not associated in the investigation proceedings. He admitted it also that the names and particulars of those persons who had brought the mobile phones were not mentioned in the case dairy. He expressed his inability to tell the names of those persons. We have also read the recovery-memos, Exh-PLL and Exh-PNN. It is mentioned in the recovery-memo, Exh-PLL, that the accused Naveed Asghar has got recovered from his house the mobile phone that was in use of the deceased Bushra. Similarly, in recovery memo, Exh-PNN, it is mentioned that the accused Khurram Shahzad has got recovered from his house the two mobile phones that were in use of the deceased persons, Zarmina and Ghazala. The clear contradiction in the oral stance of the investigation officer (PW-16) and the proceedings

of recovery reduced into writing by him in the recovery memos (Exh-PLL and Exh-PNN) makes the recoveries doubtful. It is not understandable how did the accused persons who were in police custody call their brothers to bring the mobile phones at a place where they were making recoveries of the alleged weapons of offence, i.e., Manara Pulley, not in the police station, and why did they not get those mobile phones recovered on 31.01.2010 when, as per version of the prosecution, they got recovered the other stolen articles from their houses. It is also not consistent with the normal human conduct that the offenders would have taken the mobiles phones of some of the deceased persons, and had left the mobile phone of the deceased Pervaiz Akhtar laying it on a conspicuous place, i.e., on a table beside the dead body of the deceased Pervaiz Akhtar. Non-mentioning the theft of the mobile phones of the deceased persons in the FIR or in the supplementary statement of the complainant, non joining in investigation the brothers of the accused persons who had allegedly brought the mobile phones, and not bringing on record their names and the details as to the place from where they got the said mobile phones, all these omissions, also make these alleged recoveries unreliable.

26. The prosecution has also attempted to connect the accused Khurram Sahzad with the commission of offence with the assertions that mobile phone having sims numbers 0333-5841554 and 0332-5801685 was recovered from him on his arrest on 31.01.2010 as per recovery-memo, Exh-PEE, and that the sim bearing number 0332-5801685 was used from 27.01.2010 to 28.01.2010 in the phone set bearing IMEI No. 354176029652580 of the deceased Bushra, as per the calls data (Exh-PTT). These assertions has been made on behalf of the prosecution during arguments in the courts below as well as in this Court, and was not stated as facts by the complainant (PW-15) and the investigating officer (PW-16) in their statements while appearing in the witness-box; therefore, the accused persons could not get opportunity to test the veracity of the said facts in cross-examination. Nor was this fact with the said specification put to the accused Khurram Shahzad in his statement recorded under section 342 of the Cr.P.C., and he, therefore, could not explain his stance to the prosecution evidence on it against him. Although the said assertions of the prosecution, which appears to have greatly influenced the mind of the courts below against the accused persons, cannot be entertained on these grounds only, but the close scrutiny of the prosecution evidence relied upon for making the said assertions also shows several flaws in it to connect the accused Khuram Shahzad with the commission of offence. Firstly, the empty box of a mobile phone set bearing IMEI No.354176029652580 is alleged to have been tendered by the complainant to the investigating officers on 21.01.2010, the day on which the FIR was registered, the investigating officer (PW-16) made site inspection, and the crime scene expert (PW-7) took photographs of the place of occurrence. But the fact of finding the said empty box was not mentioned in the FIR, nor was it noticed by the investigating officer during site inspection, nor was it captured by the crime scene expert while taking the photographs of the place of occurrence. Had it really been there at the place of occurrence on 21.01.2010, the investigation officer himself, not waiting for its tendering by the complainant, would have taken it into his possession. Secondly, the complainant (PW-15) stated that the said empty box was of mobile phone Nokia which was owned by the deceased Zarmina Mehak but was in use of the deceased Bushra. However, he did not state how did he came to know about these facts on 21.01.2010 when the investigating officer had not yet even applied for obtaining the calls data of the sims of the deceased persons. Thirdly, as per the calls data (Exh-PTT), on 27.01.2010 two outgoing calls were made from a phone set bearing IMEI No.354176029652580 with sim number 0332-5801685 to some person having sim number 0345-5526628 and on 28.01.2010 two outgoing calls were made to some person having sim number 0303-5431302, one outgoing call to and one incoming call from some person having sim number 0301-5826884, and one outgoing call to some person having landline number 54-4656497. But none of the said persons were joined in investigation to bring on record who had made those calls to them from that phone, nor was the record as to registered owner of the sim number 0332- 5801685 obtained. Therefore, it cannot be said with certainty that the accused Khurram Shahzad used the mobile phone bearing IMEI No.354176029652580 and made calls to those persons with sim number 0332-5801685, on January 27 and 28, 2010. Lastly but very importantly a fact has been noted, which coupled with the said noted flaws makes the whole story of recording supplementary statement of

the complainant as to finding scattered jewellery boxes, his tendering the empty box of mobile phone and addition of the offence of robbery punishable under section 392, P.P.C. in the case by the investigating officer on 21.01.2010 untrustworthy and unreliable. It is this: Admittedly the investigating officer received the clothes of the deceased persons after their postmortem examination on 22.01.2010 and took the said clothes in his possession as a piece of evidence in the case vide recovery memos (Exh-PP, PQ, PT, PU and PV) dated 22.10.2010. In all these five recovery memos prepared on 22.01.2010 the offence of robbery punishable under section 392, P.P.C. is not mentioned; this fact clearly shows that the section relating to the offence of robbery, i.e., section 392, P.P.C. had not been added in the case till 22.01.2010. Then mentioning of section 392, P.P.C. on the recovery memo (Exh-PRR) purportedly prepared on 21.01.2010 as to recovery of empty box of a mobile phone bearing IMEI No.354176029652580 makes that recovery and the recovery proceedings entirely doubtful.

Recovery of the bloodstained weapons of offence and gloves

27. The fourth incriminatory circumstantial evidence relied upon by the prosecution is the recovery of the bloodstained weapons of offence, i.e., two knives (Churri), and gloves allegedly made on pointation of the accused persons during investigation. Statement of Fazal Hussain, SI (PW-16) about the said recovery is as follows. He stated that he arrested the accused persons, Khurram Shahzad, Qadeer and Naveed, on 31.01.2010 and obtained their physical remand on 01.02.2010 for five days. On 02.02.2010 during investigation, the accused persons disclosed that they could lead to recovery from underneath Manara Pulley. In pursuance to the disclosure of the accused persons he took them to Manara Pulley situated on Mangla Road. On reaching Manara Pulley, firstly the accused Naveed Asghar led him to the recovery of knife (Churri) from underneath Manara Pulley by digging out the soil. Thereafter, the accused Khuram Shehzad got recovered a bloodstained knife (Churri) and a pair of gloves from underneath Manara Pulley by digging out the earth. And then the accused Qadeer led to the recovery of a pistol and a pair of gloves from underneath the Manara Pulley by digging out the earth. He also got exhibited the recovery memos of the said recoveries as Exh-PKK, Exh-PMM and Exh-POO respectively. In cross-examination, he stated that the witnesses to the recovery, Tahir Akhtar (PW-11) and Gul Awaiz, had reached the police station on their own. The said persons were the witnesses to all recoveries made on 27.01.2010, 31.01.2010 and 02.02.2010. There were about 7/8 shops beside the Manara Pulley, the place of alleged recoveries, but no person from amongst the shopkeepers was associated in the recovery proceedings. Village Ladhar was located at a distance of about 100/150 yards and village Shiekhupur at a distance of about 200/300 meters, from the place of recovery. No person from the localities of those villages was associated in the recovery proceedings. Manara Pulley was situated on the main road. Traffic was plying on that road round the clock. The recovery proceedings were not seen by any person from public other than the said witnesses to the recovery. The depth of Manara Pulley was about 5/6 feet from the road. Water flow area of the Manara Pulley was about 15/20 feet. The place of recovery was not inside the Manara Pulley. The accused persons dug out the earth beneath the pulley from outside. The knives (Churri) got recovered by the accused Naveed Asghar and Khurram Shahzad were wrapped in polythene shopper bags. The pistol got recovered by the accused Qadeer and the gloves got recovered by the accused Khurram Shahzad were also wrapped in polythene shopper bags. That shopper bags were not taken into possession. In the recovery memo, recovery of shopper bags was not mentioned. Tahir Akhtar (PW-11), one of the witnesses to the alleged recoveries made the similar statement. He, however, admitted in cross-examination that he was the cousin of the complainant and the other witness to the recovery proceedings, Gul Awaiz, was also his cousin, and on question stated that river Jehlum was at a distance of 100/ 150 yards form village Sheikhupur onwards.

28. It may be stated at the outset of the appraisal of the prosecution evidence as to the recoveries of the knives (Churri), the alleged weapons of offence, that it is quite astonishing that both Tahir Akhtar (PW-11) and Gul Awaiz were close relatives of the complainant reached the police station at the time when the investigating officer planned to make a raid for arrest of the accused persons and also when the accused persons were ready to cooperate for making recoveries during investigation, and thus become witnesses to all the recoveries made on 27.01.2010, 31.01.2010 and 02.02.2010. The story becomes further doubtful

when we notice that the particulars of these witnesses are written on the recovery-memos (Exh-PKK, Exh-PMM and Exh-POO) in handwriting patently different from all other writings thereon. It indicates that the particulars of the witnesses were added and their signatures obtained subsequently on the already prepared recovery memos. There were, as per version of the investigating officer, 7/8 shops and two villages near the place of alleged recoveries, but no person from those nearby shops and villages was associated in the recovery-proceedings. We are aware of the fact that the persons from the general public usually do not come forward to be witness to such police proceedings, but the assertion of the investigating officer that no person of the locality other than the said witnesses was there to see the proceedings that allegedly continued for about three hours of the day from about 02:15 to 5:00 p.m. makes the proceedings further doubtful. The story of wrapping up bloodstained knives, the alleged weapons of offence, and gloves into polythene shopper bags and then burying them in the ground close to a water stream by the offenders, for a future recovery therefrom, instead of throwing them into that water stream or a nearby river also does not appeal to a prudent mind. In the case of *Sardar Bibi v. Munir Ahmed*,²¹ this Court disbelieved the alleged recovery of bloodstained weapon of offence, i.e. a chaff cutter (Toka), made after about one month of the occurrence, with the observations that "it is not expected from an accused person to keep such weapon (stained with blood) as souvenir because during the said period there was ample time to destroy or at least washout the said weapon." Similarly, in the case of *Muhammad Asif v. State*²² this Court did not believe the alleged recovery of weapon of offence, i.e., a dagger, observing that it is "normal practice and conduct of culprits that when they select night time for commission of such crime, their first anxiety is to conceal their identity so that they may go scot-free unidentified and in that course they try their level best to conceal or destroy each piece of evidence incriminating in nature which, might be used against them in the future thus, human faculty of prudence would not accept the present story [of recovering the dagger from the shop of the appellant] rather, after committing crime with the dagger, the appellant could throw it away anywhere in any field, water canals, well or other place and no circumstances would have chosen to preserve it in his own shop if believed so because that was susceptible to recovery by the police." Recovery of weapon of offence, a corroborative evidence

29. Even otherwise, recovery of weapon of offence is only a corroborative piece of evidence; and in absence of substantive evidence, it is not considered sufficient to hold the accused person guilty of the offence charged. When substantive evidence fails to connect the accused person with the commission of offence or is disbelieved, corroborative evidence is of no help to the prosecution as the corroborative evidence cannot by itself prove the prosecution case.²³ A four-member Bench of the Federal Court of Pakistan²⁴ while reappraising the circumstantial evidence in *Siraj v. Crown*,²⁵ held that two out of three circumstances had not been proved while the third, namely, recovery of the blood stained handle of hatchet, that had been alleged to be weapon of offence, was insufficient to form the basis of a conviction. Muhammad Munir, C.J., speaking for the Bench said: "The circumstance that the appellant [accused] produced the handle of a hatchet, which had stains of human blood on it, is by itself plainly insufficient to prove that the, appellant [accused] committed the murder in question." Likewise, in *Saifullah v. State*²⁶ a four-member Bench of this Court held the recovery of a blood-stained knife, the alleged weapon of offence, insufficient for conviction on excluding the testimony of alleged eye-witness from consideration and finding the occurrence as an unseen one. The Court observed: "Considering all the facts on the record we are of the view that it was an unwitnessed occurrence... We have therefore no option but to exclude the testimony of the aforementioned two witnesses from consideration with the result that no evidence is left on the record to connect the accused with the crime in question, as the recovery of the blood-stained knife, even if believed, could only be used as evidence corroborating the testimony of the eye-witnesses, if any. But since evidence of the eye-witnesses in this case has been excluded this recovery is hardly of any use." Evidentiary value of a bloodstained alleged weapon of offence without a forensic report matching the blood found thereon with that of the deceased

30. The recovery of bloodstained knives and gloves if presumed to have been made from the petitioners, for the sake of argument, it cannot even then connect them with the commission of murders of the five

deceased persons in the present case. This Court observed in the case of *Irfan Ali v. State*²⁷ as to recovery of bloodstained alleged weapon of offence, i.e., dagger, that "when no grouping of the blood was made with the blood stained clothes of the deceased to create a nexus between the two, the same is of no help to the prosecution." Similarly in the case of *Khalid Javed v. State*,²⁸ this Court discarded the prosecution evidence of recovery of bloodstained alleged weapon of offence, i.e., the dagger and knife (Churri), and of bloodstained clothes of the accused persons in absence of matching report of the bloodstains with the blood group of deceased. In *Hamid Nadeem v. State*,²⁹ a five-member Shariat Appellate Bench of this Court rejected the recovery of bloodstained clothes of the accused as an incriminating piece of evidence while observing that the bloodstains on the recovered clothes were not got matched with the blood of the deceased. While, in the case of *Muhammad Asif v. State*,³⁰ this Court deemed it essential to point out that "mere sending the crime weapons, blood stained, to the chemical examiner and serologist would not serve the purpose of the prosecution nor it will provide any evidence to inter link different articles... unless the blood stained earth or cotton and blood stained clothes of the victim are not sent with the same for opinion of serologist to the effect that it was human blood on the crime weapons and was of the same group which was available on the clothes of the victim and the blood stained earth/cotton, such inconclusive opinion cannot be used as a piece of corroboratory evidence." The legal position may be summed up thus: As in absence of a positive report of Forensic Science Laboratory as to matching of crime empty with the allegedly recovered firearm from an accused person, the recovery of alleged weapon of offence cannot be considered as the corroborative piece of evidence against that accused person,³¹ so is the legal position regarding recovery of a bloodstained alleged weapon of offence without a positive forensic report matching the blood found thereon with that of the deceased. It can also be not used as a substantive or corroborative piece of evidence against an accused person to connect him with the commission of offence. Therefore, the prosecution evidence as to recoveries of bloodstained knives (Churri) and gloves that are alleged to have been used for the commission of offence is also not found sufficient to connect the petitioners with the commission of the offences charged.

Medical evidence, not corroborative rather supporting evidence

31. The prosecution has attempted to complete the chain of circumstantial evidence by medical evidence relating to the post mortem examinations of the deceased persons. This evidence proves only the factum that death of the deceased persons was caused by cutting their throats through some sharp edge weapon; it does in no way indicate who had cut their throats and with what particular weapon. Medical evidence is in the nature of supporting, confirmatory or explanatory of the direct or circumstantial evidence, and is not "corroborative evidence" in the sense the term is used in legal parlance for a piece of evidence that itself also has some probative force to connect the accused person with the commission of offence. Medical evidence by itself does not throw any light on the identity of the offender. Such evidence may confirm the available substantive evidence with regard to certain facts including seat of the injury, nature of the injury, cause of the death, kind of the weapon used in the occurrence, duration between the injuries and the death, and presence of an injured witness or the injured accused at the place of occurrence, but it does not connect the accused with the commission of the offence. It cannot constitute corroboration for proving involvement of the accused person in the commission of offence, as it does not establish the identity of the accused person.³² Therefore, the medical evidence is of little help to the prosecution for bringing home the guilt to the petitioners.

32. We have noted it also that although Mirza Muhammad Umar (PW-13) had stated in his statement recorded under section 161, Cr.P.C. on 21.01.2010 by the investigating officer during investigation that due to darkness he could not identify the persons standing at the door of the deceased Pervaiz Akhtar, but one Fazal Hussain is alleged to have stated in his statement recorded under section 161, Cr.P.C. on 24.01.2010 that in the evening of 20.01.2010 he had seen the petitioner, Qadeer (who was known to him) going towards the locality where the house of the deceased Pervaiz Akhtar was situated, on a motorcycle with two other persons who were not known to him. Therefore, it was necessary for the investigating officer to get conducted the test identification proceedings as to the identification of the petitioners, Khurram

Shahzad and Naveed Asghar, by the said Fazal Karim and to join him in investigation, on their arrest. As per record of the case, the said Fazal Karim was never joined again in investigation after his that alleged statement dated 24.01.2010. Non joining of Fazal Karim, purportedly the most important witness, in investigation after arrest of the petitioners in the case creates doubt even about his statement that is alleged to have been recorded on 24.01.2010. The said Fazal Karim died during trial of the case, and could not be examined as witness by the prosecution for proving the facts allegedly narrated by him in his statement dated 24.01.2010, nor was veracity of his that statement could be checked through cross-examination on behalf of the petitioners. Therefore, his alleged statement under section 161, Cr.P.C. dated 24.01.2010 could not be used for drawing any adverse inference against the petitioners. The omission of the investigating officer to get conducted the test identification proceedings of the petitioners, Khurram Shahzad and Naveed Asghar, was a serious failure in performance of his duty to conduct the investigation of the case diligently and efficiently. The way how the investigation of this very serious case involving gruesome murder of five persons of one family was conducted speaks loudly about lack of expertise and competency of the investigating officer to collect the legally admissible evidence and detect the real culprits in cases that solely rest upon circumstantial evidence. The investigating officer, in the present case, instead of collecting the evidence attempted to create it. Apart from the omissions and faults noted above in the course of appraising the prosecution evidence, the observation of the Magistrate made while declining application of the investigating officer for recording confessional statement of the petitioner, Naveed Asghar that "the accused appeared to be under pressure of the Police" also throws some light on the manner in which the investigation was conducted.

33. It is a well-established principle of administration of justice in criminal cases that finding of guilt against an accused person cannot be based merely on the high probabilities that may be inferred from evidence in a given case. The finding as regards his guilt should be rested surely and firmly on the evidence produced in the case and the plain inferences of guilt that may irresistibly be drawn from that evidence. Mere conjectures and probabilities cannot take the place of proof. If a case is decided merely on high probabilities regarding the existence or non-existence of a fact to prove the guilt of a person, the golden rule of giving "benefit of doubt" to an accused person, which has been a dominant feature of the administration of criminal justice in this country with the consistent approval of the Constitutional Courts, will be reduced to a naught.³³ The prosecution is under obligation to prove its case against the accused person at the standard of proof required in criminal cases, namely, beyond reasonable doubt standard, and cannot be said to have discharged this obligation by producing evidence that merely meets the preponderance of probability standard applied in civil cases. If the prosecution fails to discharge its said obligation and there remains a reasonable doubt, not an imaginary or artificial doubt, as to the guilt of the accused person, the benefit of that doubt is to be given to the accused person as of right, not as of concession.³⁴ The rule of giving benefit of doubt to accused person is essentially a rule of caution and prudence, and is deep rooted in our jurisprudence for safe administration of criminal justice. In common law, it is based on the maxim, "It is better that ten guilty persons be acquitted rather than one innocent person be convicted". While in Islamic criminal law it is based on the high authority of sayings of the Holy Prophet of Islam (peace be upon him): "Avert punishments [hudood] when there are doubts";³⁵ and "Drive off the ordained crimes from the Muslims as far as you can. If there is any place of refuge for him [accused], let him have his way, because the leader's mistake in pardon is better than his mistake in punishment".³⁶ A three-member Bench of this Court has quoted probably latter part of the last mentioned saying of the Holy Prophet (peace be upon him) in *Ayub Masih v. State*³⁷ in the English translation thus: "Mistake of Qazi (Judge) in releasing a criminal is better than his mistake in punishing an innocent."

34. Keeping in view the said golden rule of giving benefit of doubt to an accused person for safe administration of criminal justice, we are firmly of the opinion that all the circumstantial evidence discussed above is completely unreliable and utterly deficient to prove the charge against the petitioners beyond reasonable doubt. The prosecution has miserably failed to complete the chain of circumstances so as to establish conclusively the guilt of the petitioners in a manner that can rule out every hypothesis

inconsistent with their innocence. The circumstantial evidence tendered by the prosecution is not found to be like a well-knit chain, one end of which can touch the dead body of the deceased persons and the other the neck of the petitioners. We find that the missing links have been liberally filled up by the courts below, apparently being influence by the heinous nature of the charges involved in the case, on the basis of surmises and conjectures, and this has resulted in grave injustice. The courts below have overlooked serious pitfalls and grave infirmities in the prosecution evidence by adopting a superficial and cursory approach, not befitting the seriousness of the crime charged in the present case. The concurrent verdict returned by the courts below (trial court and appellate court) is manifestly erroneous, having been arrived at without a complete and comprehensive appreciation of all the evidence and relevant aspects of the case. The petition is therefore converted into appeal and is allowed: the judgments of the courts below are set aside and the petitioners are acquitted of the charges. They shall be released forthwith, if they are not required to be detained in some other case.

35. Before parting with the judgment, we feel constrained to observe though at the cost of some repetition but for the sake of clarity that in a criminal trial an accused person cannot be convicted on the basis of mere "suspicion" or "probability" unless and until the charge against him is "proved beyond reasonable doubt", a standard of proof required in criminal cases in almost all common law jurisdictions. An accused person cannot be deprived of his constitutional right³⁸ to be dealt with in accordance with law, merely because he is alleged to have committed a gruesome and heinous offence. The zeal to punish an offender even in derogation or violation of the law would blur the distinction between arbitrary decisions and lawful judgments. No doubt, duty of the courts is to administer justice; but this duty is to be performed in accordance with the law and not otherwise. The mandatory requirements of law cannot be ignored by labelling them as technicalities in pursuit of the subjective administration of justice. One guilty person should not be taken to task at the sacrifice of the very basis of a democratic and civilised society, i.e., the rule of law. Tolerating acquittal of some guilty whose guilt is not proved under the law is the price which the society is to pay for the protection of their invaluable constitutional right to be treated in accordance with the law. Otherwise, every person will have to bear peril of being dealt with under the personal whims of the persons sitting in executive or judicial offices, which they in their own wisdom and subjective assessment consider good for the society.

36. Foregoing are the reasons for our short order dated 07.12.2020, which for ease of reference and completion of record is reproduced hereunder:-

"For reasons to be recorded later, the instant jail petition is converted into an appeal and the same is hereby allowed. The convictions and sentences of appellants Naveed Asghar, Khurram Shehzad and Qadeer Ahmed alias Saqib are set aside. They are acquitted of the charge(s) framed against them. They are behind the bars and are ordered to be released forthwith, if not required to be detained in any other case."

MWA/N-2/SC Petition allowed.

P L D 2021 Supreme Court 684

Present: Manzoor Ahmad Malik, Syed Mansoor Ali Shah and Amin-ud-Din Khan, JJ
Messrs LUNG FUNG CHINESE RESTAURANT, LAHORE and others---Petitioners

Versus

PUNJAB FOOD AUTHORITY and others---Respondents

C.P. 1331-L of 2017, decided on 13th April, 2021.

(Against the judgment of Lahore High Court, Lahore dated 27.01.2017, passed in W.P. No.25124 of 2015).

(a) Punjab Food Authority Act (XVI of 2011)---

---Ss. 4, 7(3) & 9---International key principles integral to the architecture of food laws stated.

General Food Regulations of the European Commission-EC Regulation No. 178(2002); Principles of food safety legislation, J.L. Jouve, Food Control. Vol.9. No.2-3. pp.75-81, 1998 Elsevier Science Ltd. and The General Food Law Regulation by the European Food Safety Authority (EFSA) ref.

(b) Punjab Food Authority Act (XVI of 2011)---

---Ss. 13(1)(c), 18 & 31(2)---Constitution of Pakistan, Arts. 18, 23 & 25---Powers of Food Safety Officer to seal premises under S. 13(1)(c) of the Punjab Food Authority Act, 2011 ('the 2011 Act')---Constitutionality and legality---Power of sealing in the hands of the Food Safety Officer (FSO) could easily be applied arbitrarily which could not be permitted under the constitutional scheme, as any such act would offend fundamental rights under Arts. 18, 23 & 25 of the Constitution---Power of sealing of premises by the FSO, in its present form, was therefore ex facie discriminatory---Power of the FSO to "seal any premises" in S.13(1)(c) of the 2011 Act was declared to be unconstitutional and illegal, and it was further declared that any Rules, Regulations or SOPs promulgated under the 2011 Act dealing with "sealing of the premises" by the FSO in the absence of any sealing power under the Act were, ultra vires the 2011 Act and also illegal and without any legal effect.

The Punjab Food Authority Act, 2011 ('the 2011 Act') did not lay down any parameters or guidelines as to when the power of "sealing of premises" could be invoked by the Food Safety Officer (FSO) under section 13(1)(c) of the 2011 Act. No ground or any other legislative guideline had been given in section 13(1)(c) that permitted or empowered the FSO to exercise his discretion and invoke the power of sealing. Section 13(1)(c) simply stated that FSO could seal any premises where he believed any food was prepared, preserved, packaged, stored, conveyed, distributed or sold, examined any such food and examined anything that he believed was used, or capable of being used for such preparation, preservation, packaging, storing, conveying, distribution or sale. Nowhere did section 13(1)(c) provide when the sealing powers could be invoked. Further, the act of "sealing" was not supported by a remedial mechanism as in the case of seizure of food. Therefore, there was no legal remedy available to a food operator or food business after the premises had been sealed. There was also no provision for de- sealing under the Act. More importantly, a similar power had been actually vested in the FSO under section 18 of the Act for passing emergency prohibition orders whereby a food operator could be restrained from carrying on food business. The difference was that within twenty-four hours the aggrieved party could approach the Food Authority for its redressal against such order (Section 18(2)). The so-called sealing power under section 13(1)(c) amounted to frustrating section 18 and the scheme of the 2011 Act.

In the absence of any legislative policy or guideline clearly spelling out when the sealing could take place and there being no remedial process provided against sealing, the power of sealing in the hands of the FSO could easily be applied arbitrarily which could not be permitted under the constitutional scheme, as any such act would offend fundamental rights under Articles 18, 23 and 25 of the Constitution. The power of sealing of premises by the FSO, in its present form, was therefore ex facie discriminatory. Supreme Court declared that the power of the FSO to "seal any premises" in section 13(1)(c) was unconstitutional and illegal, hence, the power to seal the premises of a food operator or a food business by the FSO was struck down; that reference to "sealing" in section 31(2) was also to be accordingly struck down; that the rest of the provision [section 13(1)(c)] shall remain intact and continue to be enforceable;

that any Rules, Regulations or SOPs promulgated under the 2011 Act dealing with "sealing of the premises" by the FSO in the absence of any sealing power under the Act were, therefore, ultra vires the Act and also illegal and without any legal effect.

(c) Punjab Food Authority Act (XVI of 2011)---

----Ss. 13(1)(ca), 16, 18 & 39(1)(d)---Constitution of Pakistan, Art. 10A---Powers of Food Safety Officer (FSO) to impose fines, issue Improvement Notice or issue Emergency Prohibition Orders under the Punjab Food Authority Act, 2011 ('the 2011 Act')---Constitutionality---All said powers enjoyed by the FSO provided a supporting remedial forum for the aggrieved party---Said powers and their corresponding provisions in the 2011 Act not only met the requirement of Art.10A of the Constitution regarding fair trial and due process, but they also gave the FSO the choice to make risk analysis and then adopt a proper risk management strategy by either issuing a Notice of Improvement or imposing a fine or taking a more stern action by seizing the food item which contravened the provisions of the 2011 Act or if the risk to human health was imperative, to issue Emergency Prohibition Order and restrain the food operator from carrying on food business under S. 18 of the 2011 Act---The enforcement interventions by the FSO under the 2011 Act were laid out in a manner that highlighted the concept of proportionality and must be applied in such spirit on case to case basis.

(d) Punjab Food Authority Act (XVI of 2011)---

----Ss. 7, 13 & Preamble---Constitution of Pakistan, Arts. 18 & 24(1)---Powers of Food Authority and Food Safety Officers---Principles of 'scientific risk analysis' and 'proportionality'---Scope---Punjab Food Authority Act, 2011 ('the 2011 Act') could only be put to an effective use to achieve its goal of food safety and protection of human health if the key principles of scientific knowledge, risk analysis, proportionality and precautionary principle were kept in mind by the Food Safety Officer (FSO) and the Food Authority--Additionally, the FSO must be of the requisite qualification as provided under S.13 of the 2011 Act, he must be abreast with the latest food and health science to be able to make intelligent and smart risk analysis of the risk and danger to food and healthy safety in any given situation---Any drastic step by the Food Authority or its officers that was not based on scientific risk analysis or was not proportionate to the health hazard involved, could cause huge economic and financial loss to the food business by bringing the business of a food operator to a crushing halt, thereby offending the constitutional rights to business and property of a food operator or food business---If the contravention under the 2011 Act could be remedied through a less harsh mechanism provided under the law, taking of a more drastic step should be avoided; this was a balancing act the Food Authority had to undertake to meet the international food law principle of proportionality.

(e) Punjab Food Authority Act (XVI of 2011)---

----S. 38---Constitution of Pakistan, Art. 10A---Publication of names of convicts in newspapers---Constitutionality and scope---Section 38 of the Punjab Food Authority Act, 2011 ('the 2011 Act') dealt with publication in the newspapers and provided that after the conviction under the 2011 Act had attained finality, the Food Authority with the permission of the Special Court could publish the name of the food operator or food business in the newspapers or in any other mode for information---Section 38 clearly barred the Food Authority and its officers to publicize any proceedings taken against a food business or a food operator under the 2011 Act unless the conviction had attained finality and there was permission granted by the court for its publication----Food Authority and Food Safety Officers (FSOs), therefore, cannot release any information during the pendency of the proceedings under the 2011 Act---Section 38 of the 2011 Act was in line with the requirement of due process and fair trial---Any violation of S.38 would make the FSO or any other officer of the Food Authority liable to departmental action.

(f) Punjab Food Authority Act (XVI of 2011)---

----Ss. 7, 13 & Preamble---Powers of Food Authority and Food Safety Officers---'Precautionary principle'--Scope---Precautionary principle [Article 7 of EU Law Regulation (EC) No. 178/2002] referred to specific situations where: (i) there were reasonable grounds for concern that an unacceptable level of risk to health existed and (ii) the available supporting information and data were not sufficiently complete to enable a

comprehensive risk assessment to be made---When faced with these specific circumstances, decision makers or risk managers may take measures or other actions based on the precautionary principle, while seeking more complete scientific and other data---Such measures were provisional until the time when more comprehensive information concerning the risk could be gathered and analysed---Precautionary principle had no application where the food items inspected by the Food Safety Officer (FSO) were found to be adulterated, substandard or misbranded, unsafe or suffered from false advertisement or false labelling or were kept under unhygienic and unsanitary conditions---No scientific uncertainty existed about such contravention and could easily be checked on the spot or in a food laboratory---Precautionary principle was to be applied where the health and food safety risk attached to a food item was scientifically uncertain and created doubt of health risk, in such a case, till such time that there was scientific certainty, such a food item could be seized or recalled as the case may be.

M. Irfan Khan Ghaznavi, Advocate Supreme Court for Petitioners.

Iftikhar Ahmad Mian, Advocate Supreme Court, Ch. Sultan Mahmood, Advocate Supreme Court, Sheheryar Sultan, Secretary, Food Department, Government of the Punjab, Rafaqat Ali Niswana, D.G. Punjab Food Authority, Anum Gulraiz Mir, Addl. Director Legal and Usman Samad, Assistant Director, Legal for Respondents.

Ahmad Awais, A.G. Punjab and Rana Shamshad Khan, Addl. A.G. Punjab on Court's notice.

Date of hearing: 9th March, 2021.

JUDGMENT

SYED MANSOOR ALI SHAH, J.---On 08.08.2015, Food Safety Officer ("FSO") of the Punjab Food Authority visited LUNG FUNG, Chinese restaurant in Lahore. After carrying out inspection of six freezers installed in the restaurant, the FSO sealed the said restaurant on the same day allegedly invoking his powers under section 13 (1) (c) of the Punjab Food Authority Act, 2011 ("Act")¹. Later on the said restaurant was allegedly de-sealed on 17.08.2015 and the restaurant was served with an Improvement Notice under section 16 of the Act. The petitioner-restaurant and its proprietors challenged the act of sealing of the restaurant by FSO, the methodology of enforcement under the Act and the constitutionality and vires, inter alia, of the power of "sealing" exercised by the FSO under section 13(1)(c) of the Act.

2. We have heard the learned counsel for the parties at some length and have examined the provisions of the Act. Brief facts are that the FSO upon examining the freezers installed in the kitchen sealed the premises (restaurant) vide sealing order dated 08.08.2015, which is reproduced hereunder for convenience and reference:-

Form 18

ORDER OF SEALING

(Under section 13 (1) (c) (g) of the Punjab Food Authority Act, 2011)

The powers conferred under section 13 read with section 51 of the Punjab Food Authority Act, 2011, the undersigned has reason to believe that there are sufficient grounds for sealing of your premises. I being an authorized officer, hereby direct you to keep the following food stock sealed till such orders as may be issued subsequently in relation thereto:-

(Name of the Food Business Operator and address of the premises)

Lung Fund Chines Restaurant,
Kashmir Road, Near Governor House.

Sr. No.	Name of the product	Batch No.	No. of Units	Qty. in KGs.
1.	Freezers		6	

2.				
3.				
4.				
5.				

- > Fine was imposed last time;
- > Workers were not wearing caps.
- > Dirty washing area.
- > Stagnant water on kitchen floor.
- > Raw and cooked food stored together in freezer.
- > Expired bread found of 24.07.2015;
- > Poor premises hygiene.
- > Flies found on uncovered food.

Even though the tenor of the above Order shows that only the food stock (i.e., in the six freezers) has been sealed but admittedly, on ground the entire restaurant was sealed. Later on the restaurant was allegedly de-sealed on 17.08.2015 and Improvement Notice under section 16 of the Act was served on the petitioner, which is reproduced hereunder:-

3. Learned counsel for the respondents was unable to explain, on what grounds and under whose authority were the premises of the food business sealed and then de-sealed, under the Act. The respondents, inspite of our repeated queries failed to produce the de-sealing order or refer to the relevant law in this regard. They also failed to explain whether the law provided for any grounds or reasons for "sealing of premises" under section 13(1)(c) of the Act.

4. In this factual background, before examining the relevant provisions of the Act, it would be useful to have an understanding of the international key principles that are integral to the architecture of food laws. Consideration of these principles is in line with section 7(3) of the Act which provides that the Food Authority shall exercise its functions, as far as possible, in accordance with the well established scientific principles and international best practices. According to well established General Food Regulations of the European Union,² modern food safety legislation must protect the interests and concerns of consumers³ and the legitimate interests of food operators⁴. The constitution of the Food Authority under the Act (section 4) is therefore broad based and inclusive of all the competing interests: the Government, scientific experts, legislators, representatives of the food operators and of the consumers. Under international best practice, food safety legislation is required to be science based; reliant on risk analysis including: risk assessment and risk management; must maintain proportionality - finding solutions proportionate to health risks; achieve health protection on a preventive basis;⁵ and apply the precautionary principle, where required. The measures to be taken to protect health and food safety must be underpinned by strong science. It is for this reason that a Scientific Panel has been constituted under the Act (section 9) to formulate recommendations for the Food Authority on food standards, procedures, processes and guidelines in relation to technical aspect of food. The European Commission⁶ has been at the forefront of the development of risk analysis principles, including risk assessment and risk management, that must be undertaken in an independent, objective and transparent manner based on the best available science. Risk management is the process of weighing policy alternatives in the light of results of a risk assessment and selecting the appropriate actions necessary to prevent, reduce or eliminate the risk. In the risk management phase, the decision makers need to consider a range of other information in addition to the scientific risk assessment e.g., feasibility of controlling a risk; socio-economic effects; environmental impact⁷ and other techniques of risk analysis, such as cost/benefit analysis. Proportionality is normally understood as the right balance between ends and means. Action taken must be proportionate to real health risks involved. Wherever possible, health protection and food safety should be achieved on a preventive basis. In case

where there is scientific uncertainty about the health risk attached to a food item, the use of precautionary principle has been imported from the world of environmental law into food laws to address such a situation. These principles are fully in line with our constitutional mandate and promote fundamental rights to fair trial (Article 10A), to business (Article 18) and to property (Article 23) of a food operator or a food business.

5. The objective of the Act is to establish the Punjab Food Authority to protect public health, provide safety and standards of food. There are three regulatory regimes under the Act that provide for food safety and public health: (i) powers enjoyed by Food Safety Officer; (ii) powers enjoyed by the Food Authority and (iii); powers of the Special Court. FSO, the field officer, who visits food businesses and food operators, enjoys the power to seize food, apparatus, etc. if it appears to him to be in contravention of the Act. Contraventions have been spelled out in the shape of offences e.g., selling adulterated food;⁸ manufacturing, selling, storing, distributing, importing and exporting of substandard or misbranded food⁹; or unsafe food;¹⁰ selling food using false advertisement¹¹; or preparing and packing any food using false labeling¹² and keeping food under unhygienic and unsanitary conditions.¹³ The powers of seizure are invoked if there is a contravention of the Act by the FSO and is elaborately dealt with in section 13(3), (4), and (5) providing detailed mechanism whereby an aggrieved person can within seven days approach the Special Court against the said seizure. As opposed to seizure, the Act does not lay down any parameters or guidelines as to when the power of "sealing of premises" can be invoked by the FSO under section 13(1)(c). The provision is reproduced hereunder for reference;--

13. Powers of Food Safety Officer.---(1) A Food Safety Officer may-

- (a) take sample of any food or any substance, which appears to him to be intended for sale, or has been sold as food;
- (b) seize any food, apparatus or utensil which appears to the Food Safety Officer to be in contravention of this Act, the rules or the regulations;
- (c) enter or seal any premises where he believes any food is prepared, preserved, packaged, stored, conveyed, distributed or sold, examine any such food and examine anything that he believes is used, or capable of being used for such preparation, preservation, packaging, storing, conveying, distribution or sale; (emphasis supplied)

No ground or any other legislative guideline has been given in section 13(1)(c) that permits or empowers the FSO to exercise his discretion and invoke the power of sealing. Section 13(1)(c) simply states that FSO can seal any premises where he believes any food is prepared, preserved, packaged, stored, conveyed, distributed or sold, examine any such food and examine anything that he believes is used, or capable of being used for such preparation, preservation, packaging, storing, conveying, distribution or sale. Nowhere does section 13(1)(c) provide when the sealing powers can be invoked. Further, the act of "sealing" is not supported by a remedial mechanism as in the case of seizure of food. Therefore, there is no legal remedy available to a food operator or food business¹⁴ after the premises¹⁵ have been sealed. There is also no provision for de-sealing under the Act. More importantly, a similar power has been actually vested in the FSO under section 18 of the Act for passing emergency prohibition orders whereby a food operator can be restrained from carrying on food business. The difference is that within twenty-four hours the aggrieved party can approach the Food Authority for its redressal against such order (Section 18(2)). The so-called sealing power under section 13(1)(c) amounts to frustrating section 18 and the scheme of the Act. In the absence of any legislative policy or guideline clearly spelling out when the sealing can take place and there being no remedial process provided against sealing, the power of sealing in the hands of the FSO can easily be applied arbitrarily which cannot be permitted under our constitutional scheme, as any such act would offend fundamental rights under Articles 18, 23 and 25 of the Constitution. The power of sealing of premises by the FSO, in its present form, is therefore *ex facie* discriminatory. We, therefore, declare that the power of the FSO to "seal any premises" in section 13(1)(c) to be unconstitutional and illegal. Hence, the power to seal the premises of a food operator or a food business by the FSO is struck down. Reference to "sealing" in section 31(2) is also accordingly struck down. The rest of the provision [section 13(1)(c)]

shall remain intact and continue to be enforceable. Any Rules, Regulations or SOPs promulgated under the Act dealing with "sealing of the premises" by the FSO in the absence of any sealing power under the Act are, therefore, ultra vires the Act and are also declared illegal and without any legal effect.

6. Other than the above, the FSO can also impose fines

(subject to delegation of powers under section 51), issue Improvement Notice or issue Emergency Prohibition Orders. The relevant provisions are:

13 Powers of Food Safety Officer.---(1) A Food Safety Officer may-

(a)

(b)

(c)

(ca) impose fine on a food operator if the Authority has delegated such power to him;

read with section 39((1)(d) where a Food Authority can impose fine on the food operator which may extend to one million rupees:

16 Improvement notice.---(1) If a Food Safety Officer has reasons to believe that any food operator has failed to comply with any provisions of this Act, the rules or the regulations, he may serve an improvement notice upon the food operator-

(a) stating the grounds for believing that the food operator has failed to comply with any provisions of the Act or the rules or the regulations;

(b) specifying the matters which constitute the food operator's failure so to comply; and

(c) intimating the measures which the food operator should take in order to secure compliance with the relevant provisions of the law.

(2) If the food operator fails to comply with the improvement notice within the prescribed time, the Food Authority may cancel or suspended his licence or take such other action as it deems appropriate.

18. Emergency prohibition orders.---(1) If the Food Safety Officer is satisfied that the health risk condition exists with respect to any food business, he may, after serving a notice on the food operator and for reasons to be recorded in writing, restrain him from carrying on the food business with or without specifying conditions or period of such restraint.

(2) The Food Safety Officer shall, within twenty four hours of the action taken under sub-section (1), report such action to the Food Authority which may, after serving a notice on the food operator and for reasons to be recorded in writing, confirm, modify or set aside the order of the Food Safety Officer.

All these powers enjoyed by the FSO provide a supporting remedial forum for the aggrieved party. These provisions not only meet the requirement of Article 10A of the Constitution regarding fair trial and due process, but they also give the FSO the choice to make risk analysis and then adopt a proper risk management strategy by either issuing a Notice of Improvement or imposing a fine or taking a more stern action by seizing the food item which contravenes the provisions of the Act or if the risk to human health is imperative, to issue Emergency Prohibition Order and restrain the food operator from carrying on food business under section 18. The enforcement interventions by the FSO under the Act are laid out in a manner that highlight the concept of proportionality and must be applied in this spirit on case to case basis.

7. The second regulatory regime is under the Food Authority itself. Section 7 lays down the powers and functions of the Food Authority, which are reproduced hereunder for reference:-

"S 7. Powers and functions of the Food Authority.---

(1) The Food Authority shall regulate and monitor the food business in order to ensure provision of safe food.

(2) Without prejudice to the provisions of sub-section (1), the Food Authority may-

(a) formulate standards, procedures, processes and guidelines in relation to any aspect of food including food business, food labelling, food additive, and specify appropriate enforcement systems;

(b) specify procedures and guidelines for setting up and accreditation of food laboratories;

- (c) formulate method of sampling, analysis of samples and reporting of results;
 - (d) specify licensing, prohibition orders, recall procedures, improvement notices or prosecution;
 - (e) determine terms and conditions of service of its employees;
 - (f) provide scientific advice and technical support to the Government in matters relating to food;
 - (g) collect and analyze relevant scientific and technical data relating to food;
 - (h) establish a system of network of food operators and consumers to facilitate food safety and quality control;
 - (i) organize training programmes in food safety and standards;
 - (j) promote general awareness as to food safety and standards;
 - (k) levy fee for registration, licensing and other services;
 - (l) certify food for export;
 - (m) perform any other prescribed function; and
 - (n) do any other thing which is necessary for the discharge of its functions under this Act.
- (3) The Food Authority shall exercise its functions, as far as possible, in accordance with the well-established scientific principles and international best practices."

(emphasis supplied)

The Food Authority issues licenses, imposes fines and also sits as an appellate authority over the Emergency Prohibition Orders passed by the FSO. Relevant provisions are as under:

- 15 Licensing of food business.---(1) A person shall not use any place for food business except under the prescribed registration or licence.
- (2) The Food Authority may, in the prescribed manner, exempt a class of food operators from obtaining compulsory registration or licence under this section.
18. Emergency prohibition orders.---(1) If the Food Safety Officer is satisfied that the health risk condition exists with respect to any food business, he may, after serving a notice on the food operator and for reasons to be recorded in writing, restrain him from carrying on the food business with or without specifying conditions or period of such restraint.
- (2) The Food Safety Officer shall, within twenty four hours of the action taken under subsection (1), report such action to the Food Authority which may, after serving a notice on the food operator and for reasons to be recorded in writing, confirm, modify or set aside the order of the Food Safety Officer.
39. Jurisdiction of the Food Authority---(1) On information received from any source, the Food Authority may, for reasons to be recorded in writing-
- (a)
 - (b)
 - (c) impose fine on the food operator which may extend to one million rupees.

Read with section 45: where these fines can be recovered as arrears of land revenue.

The Food Authority or its officers can also register criminal cases or file a criminal complaint for the contravention of the Act.

8. The third regulatory regime is under the Special Court. Offences and Penalties provided under Chapter IV including selling food against the law; or relating to substandard or misbranded food; unsafe food; false advertisement and false labeling; unhygienic or unsanitary conditions¹⁶ or passing Prohibition Orders, are dealt with by the Special Court¹⁷:-

- 17 Prohibition orders.---If any food operator is convicted of an offence under this Act and the Court is satisfied that the health risk exists with respect to the food business, the Court, may impose the following prohibitions-
- (a) a prohibition on the use of a process, treatment, premises or equipment for purposes of the food business; or
 - (b) a prohibition, with or without specifying period of prohibition, on the food operator to conduct or operate the food business.

9. On the whole, the Act can only be put to an effective use to achieve its goal of food safety and protection of human health if the key principles of scientific knowledge, risk analysis, proportionality and precautionary principle are kept in mind by the FSO and the Food Authority. Additionally, the FSO must be of the requisite qualification as provided under section 13 of the Act, he must be abreast with the latest food and health science to be able to make intelligent and smart risk analysis of the risk and danger to food and healthy safety in any given situation. For example in the present case, the food in the freezers of the petitioner restaurant could have been seized or fine imposed or an Improvement Notice issued. Any drastic step by the Food Authority or its officers that is not based on scientific risk analysis or is not proportionate to the health hazard involved, can cause huge economic and financial loss to the food business by bringing the business of a food operator to a crushing halt, thereby offending the constitutional rights to business and property of a food operator or food business. If the contravention under the Act can be remedied through a less harsh mechanism provided under the law, taking of a more drastic step should be avoided. This is a balancing act the Food Authority has to undertake to meet the international food law principle of proportionality.

10. Section 38 of the Act deals with publication in the newspapers and provides that after the conviction under the Act has attained finality, the Food Authority with the permission of the Special Court can publish the name of the food operator or food business in the newspapers or in any other mode for information. This clearly bars the Food Authority and its officers to publicize any proceedings taken against a food business or a food operator under the Act unless the conviction has attained finality and there is permission granted by the court for its publication. The Food Authority and FSOs, therefore, cannot release any information during the pendency of the proceedings under the Act. This is also in line with the requirement of due process and fair trial. Any violation of section 38 would make the FSO or any other officer of the Food Authority liable to departmental action. It is also noted with concern that the Act mandatorily provides for the inclusion of several females in the composition of the Food Authority under section 4. We asked the concerned Secretary, of the Government of the Punjab, if the requirement of gender balance has been complied with. The Secretary assured us that section 4 has been given full effect to and the composition of the Authority is complete in accordance with the law.

11. Reliance in the impugned judgment by the High Court on the precautionary principle to justify the sealing of the premises in the present circumstances is somewhat misplaced. The precautionary principle (Article 7 of the General Food Law) refers to specific situations where: (i) there are reasonable grounds for concern that an unacceptable level of risk to health exists and (ii) the available supporting information and data are not sufficiently complete to enable a comprehensive risk assessment to be made. When faced with these specific circumstances, decision makers or risk managers may take measures or other actions based on the precautionary principle, while seeking more complete scientific and other data. Such measures are provisional until the time when more comprehensive information concerning the risk can be gathered and analysed.¹⁸ This principle has no application where the food items inspected by the FSO are found to be adulterated, substandard or misbranded, unsafe or suffer from false advertisement or false labelling or are kept under unhygienic and unsanitary conditions. There is no scientific uncertainty about such contravention and can easily be checked on the spot or in a food laboratory. Precautionary principle is to be applied where the health and food safety risk attached to a food item is scientifically uncertain and creates doubt of health risk, in such a case, till such time that there is scientific certainty, such a food item can be seized or recalled as the case may be. This is an important principle but has no application to the present case and has been incorrectly relied upon by the High Court in justifying an unconstitutional provision of law.

12. For all the above reasons we set aside the impugned judgment and declare the power to seal the petitioner restaurant by the Food Safety Officer under section 13(1)(c) vide Order dated 08.08.2015 to be unconstitutional and illegal. We, therefore, convert this petitions into an appeal and allow the same in the above terms.

MWA/L-4/SC Petitions allowed.