

Present: Qazi Faez Isa, C.J., Sardar Tariq Masood, Syed Mansoor Ali Shah, Yahya Afridi, Amin-ud-Din Khan, Jamal Khan Mandokhail, Muhammad Ali Mazhar, Syed Hasan Azhar Rizvi, and Musarrat Hilali, JJ

Reference No. 1 of 2011, decided on 5th July, 2024.

(Reference by the President of Islamic Republic of Pakistan under Article 186 of the Constitution).
Per Qazi Faez Isa, C.J.; Sardar Tariq Masood, Amin-ud-Din Khan, Jamal Khan Mandokhail, Musarrat Hilali and Muhammad Ali Mazhar, JJ. agreeing; Syed Mansoor Ali Shah, Yahya Afridi and Syed Hasan Azhar Rizvi, JJ. partially agreeing with the majority opinion with their own reasons.

(a) Constitution of Pakistan---

---Art.186---Reference by the President under Article 186 of the Constitution---Judge of Supreme Court, who was part of the Bench which heard the Reference, signing the short opinion/order but retiring before the detailed reasons released and signed---Held: Judges who retire before signing the detailed reasons could do so after their retirement---It is commonsensical that, if a Judge has already signed a written opinion/short order, but then retires, he can sign/give the detailed reasons post-retirement---This also prevents the unnecessary wastage of public resources and Court time, which would happen if the Bench was to be reconstituted (after the retirement of a Judge) and the entire matter heard again.

Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v President of Pakistan PLD 2016 SC 61 ref.

(b) Constitution of Pakistan---

---Art. 186---Reference by the President under Article 186 of the Constitution to revisit the cases of Zulfiqar Ali Bhutto (former Prime Minister of Pakistan) reported as Zulfikar Ali Bhutto and 3 others v. The State (PLD 1979 Supreme Court 38) and Zulfikar Ali Bhutto v. The State (PLD 1979 Supreme Court 53)---Conviction and execution of death sentence awarded to Zulfiqar Ali Bhutto---Advisory jurisdiction of the Supreme Court under Article 186 of the Constitution---Scope---Supreme Court clarified that it was not hearing a petition, an appeal or a review petition---Neither the Constitution nor the law provides a mechanism whereby Mr. Bhutto's conviction could be set aside---Mr. Bhutto's conviction attained finality after the dismissal of his review petition by the Supreme Court---In its advisory jurisdiction under Article 186 of the Constitution, the Supreme Court cannot undo the decision (of Mr. Bhutto's conviction).

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

---Ss. 411-A & 526---Penal Code (XLV of 1860), S. 302(b)---Constitution of Pakistan, Art. 185(2)(b)---Trial by the High Court---Scope---Article 185(2)(b) of the Constitution and sections 411-A and 526 of the Cr.P.C permit trials to be conducted by the High Court, but these provisions do not provide for a High Court to conduct a murder trial. [Majority view]

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

---S. 302(b)---Qatl-i-amd---Motive---Scope---In criminal cases the prosecution need not set up a motive but if it elects to do so and then fails to establish it the prosecution suffers its consequences---Motive's absence, or failure to establish it is also consequential in a murder case in which the guilt of the offender is established but the asserted motive is not---In such cases the accused invariably is not given capital punishment, but instead imprisonment for life.

Hakim Ali v. State 1971 SCMR 432 and Habibullah v. State PLD 1969 SC 127 ref.

(e) Constitution of Pakistan---

---Arts. 4,9, 10A, 66(1) & 186---Penal Code (XLV of 1860), Ss. 302, 307, 120B & 109---Criminal Procedure Code (V of 1898), S. 376---Reference by the President under Article 186 of the Constitution to revisit the cases of Zulfiqar Ali Bhutto (former Prime Minister of Pakistan) reported as Zulfikar Ali Bhutto and 3 others v. The State (PLD 1979 Supreme Court 38) and Zulfikar Ali Bhutto v. The State (PLD 1979 Supreme Court 53)---Murder trial of Zulfiqar Ali Bhutto ("Mr. Bhutto") by the Trial Court (the Lahore High Court) and the appellate court (the Supreme Court)---Requirements of due process and fair trial not met---Legal heirs of deceased did not object to or challenge closure of (initial) investigation by the Magistrate---Investigation was

reopened and transferred to Federal Investigation Agency (FIA) immediately after General Zia-ul-Haq's coup d'état overthrowing Mr. Bhutto's government---Significantly, no judicial order was issued directing that the investigation be reopened or the crime reinvestigated by the FIA---In the post coup investigation interim investigation report (challan) was submitted, and in addition to section 302 (murder) of the Pakistan Penal Code, 1860 ('P.P.C.') and section 307 (attempt to murder) mentioned in the FIR, sections 120B (criminal conspiracy to commit an offence) and 109 (abetment of an offence) were added---Acting Chief Justice ('ACJ') of the Lahore High Court transferred the case to the Lahore High Court for trial despite the fact that the Sessions Judge, Lahore had already taken cognizance of the case---This was done by the 'ACJ' without issuing notices to Mr. Bhutto and to the other accused, without providing them an opportunity of a hearing and without enabling them to acquire legal representation---Mr. Bhutto had appointed General Zia-ul-Haq as the Army Chief who by his actions of 5 July 1977 (i.e. coup d'état) had clearly violated Article 6 of the Constitution and committed the offence of high treason, the prescribed punishment for which is imprisonment for life or death---General Zia, therefore had a motive to proceed against Mr. Bhutto, because had he not done so, Mr. Bhutto may have proceeded against him for committing high treason---By conducting the murder trial itself, the High Court made redundant a number of provisions of the Constitution and Chapter XXVII of the Code of Criminal Procedure, 1898 ("the Code")---Section 376 of the Code requiring the confirmation of death sentences was violated and this inalienable right was contravened---Since the trial was conducted by the High Court itself, Mr. Bhutto and the other accused were deprived of one right of appeal, which Articles 4(1) and 9 of the Constitution guaranteed---Foremost basis for the conviction of Mr. Bhutto was the testimony of an accused, who turned approver, namely, the then Director-General of the Federal Security Force ('FSF')---After the coup d'état of 5 July 1977 approver was arrested, nominated as an accused and pleaded that he would make disclosure of the crime, provided he was pardoned---His plea was accepted and he was made an approver---Crime was committed three years earlier and approver's conscience remained dormant and only awoke when he was arrested---Approver's credibility was accepted and he was believed without demur by the Trial and Appellate Courts---However, there were a number of factors which prudence should have alerted and shown that he was self-serving, self-preserving, morally bankrupt, and a false witness---Furthermore, confessions must be voluntary and must not have been obtained by fear of prejudice or hope or advantage---If the confession directly or indirectly is the result of inducement, threat or promise from a person in authority, it would be treated as not voluntary---With regard to the three offences attracting death sentences, section 302, P.P.C. (murder), section 307 PPC (attempted murder) and section 111, P.P.C. (abetment), there was no direct or circumstantial evidence against Mr. Bhutto---Spent bullet casings, ejected from the firearm(s) that were used in the attack, did not match any of the weapons in use of the FSF---Trial Court proceeded on an incorrect assumption that the motive stood established, even though the facts did not suggest this---Proceedings of the National Assembly were also relied upon by the Courts for establishing motive, which was not permissible [Article 66(1) of the Constitution]---Mr. Bhutto's enmity with the complainant was cited by the complainant as the motive, however, it was not even considered that such enmity could equally be a reason to falsely implicate Mr. Bhutto---First reporting of the crime to the police was by complainant's brother, however, the FIR was not registered when he reported the crime, nor was he cited as the informant/complainant in the FIR when it was registered---Surprisingly, complainant's brother was also not produced as a witness---All the six co-accused were arrested after General Zia's coup d'état and the imposition of Martial Law, and all of them had confessed to the crime---This remarkable coincidence was not considered by the Trial Court or the Appellate Court to be unusual nor was it ever considered whether these confessions could have been induced---Two of the accused were pardoned and made approvers---Acting Chief Justice, who headed the Bench of the Lahore High Court which had convicted Mr. Bhutto, and the Chief Justice of the Supreme Court who headed the Bench which had upheld the conviction, both assumed their offices in somewhat unusual circumstances giving rise to justifiable misgivings---Bias was on display in a number of paragraphs of the Trial Court's (High Court's) judgment---Gratis observations were made which had absolutely nothing to do with the case before the Court---Manner in which the trial was conducted was antithetical to a fair trial and due process---Trial Court (High Court), which had tried and convicted Mr. Bhutto, and the Appellate Court

(Supreme Court), which had dismissed his appeal, were operating when there was no constitutional rule in the country and one man's (General Zia-ul-Haq's) will and whim became legislation and his person had replaced the entire democratic order---Major constitutional and legal lapses that had occurred during the trial, appeal and review stage with respect to requirements of fair trial and due process stated.

Abul A'la Moudoodi v. Government of West Pakistan PLD 1964 SC 673; Benazir Bhutto v. Federation of Pakistan PLD 1988 SC 416; Government of Balochistan v. Azizullah Memon PLD 1993 SC 341; Al-Jehad Trust v. Federation of Pakistan PLD 1996 SC 324; Government of Sindh v. Sharaf Faridi PLD 1994 SC 105; Ibrahim v King, (1975) 3 All ER 175; Muhammad Amjad v. State PLD 2003 SC 704; Dhani Bakhsh v. State PLD 1975 SC 187; Hakim Ali v. State 1971 SCMR 432 and Habibullah v. State PLD 1969 SC 127 ref. Per Syed Mansoor Ali Shah, J.; partially agreeing with Qazi Faez Isa, CJ. with his own reasons

(f) Constitution of Pakistan---

---Art. 186---Advisory jurisdiction of the Supreme Court under Article 186 of the Constitution---Scope---In its advisory jurisdiction, the Supreme Court cannot undertake a fact-finding inquiry, adjudicate a lis between parties or review its judgment rendered in its adjudicatory jurisdiction.

Reference No. 1 of 2012 PLD 2013 SC 279; Cauvery Water Disputes Tribunal's case AIR 1992 SC 522; Al-Jehad Trust v. Federation of Pakistan PLD 1997 SC 84; Reference No. 1 of 1988 PLD 1989 SC 75 and Special Reference No.1 of 1955 PLD 1955 FC 435 ref.

(g) Criminal trial---

---Political trials---Scope and purpose---Around the world, authoritarian regimes use “political trials” to legitimize their seizures of power, delegitimize opponents and consolidate authority---A political trial is one whose disposition—the determination of guilt or innocence, followed by punishment—depends primarily on the accused's professed attitudes and activities in relation to the ruling regime---In such trials, the legal process is not employed to ensure justice or minimize errors but rather to discredit and punish political opponents---These trials often rely heavily on statements obtained during investigations from former allies or associates of the accused, who may be coerced or induced to turn against the accused---Such evidence, which would usually hold limited weight in a fair trial, becomes a convenient basis for conviction in a political trial, supporting the alleged criminality of the accused---Political trials thus serve as a potent and notorious “judicial tool” for authoritarian regimes, aimed at suppressing political resistance and eliminating opposition--
-These trials frequently violate due process and fair trial requirements to produce politically desirable outcomes.

Fiona Shen-Bayh, Undue Process: Persecution and Punishment in Autocratic Courts, (2022); Raymond Suttner, Political Trials and the Legal Process, (1985) and Anthony Pereira, Persecution and Farce: The Origins and Transformation of Brazil's Political Trials, 1964- 1979, (1998) ref.

(h) Administration of justice---

---“Transitional justice”---Scope and purpose---In post-authoritarian regimes, “transitional justice” forms a crucial part of the transition from repressive authoritarianism to constitutional democracy---It involves uncovering the crimes of former authoritarian rulers and holding them accountable for past human rights violations, including unlawful detentions, imprisonments and politically motivated trials---Transitional justice, however, is not about vengeance or retribution but about a principled approach to healing and justice--
-Courts globally have affirmed that they must address the demands of victims for truth and justice while laying the foundation for societal reconciliation and systemic transformation---This dual focus on accountability and restoration is what sets transitional justice apart from ordinary judicial processes---
Transitional justice, therefore, encompasses a set of methods through which states that have experienced fundamental human rights violations seek to distance themselves from that past and move forward in a manner consistent with the need for justice for those who have suffered from these violations---These methods of transitional justice include truth and reconciliation commissions and the criminal prosecution of former authoritarian rulers---Furthermore, holding both executive and judicial institutions accountable for their actions during the period of authoritarian repression, as well as exonerating past victims of state repression and miscarriages of justice, is essential for facilitating the transition of these state institutions

toward greater respect for, and promotion of, the rule of law and fundamental human rights---Transitional justice encompasses broader mechanisms, including revisiting flawed judicial decisions made during authoritarian regimes through compromising due process and fair trial requirements---This process helps restore fairness and legitimacy in the legal system---By revisiting and rendering opinions on the fairness and legitimacy of such decisions, the Court delivers justice to affected individuals and sends a powerful message: judicial complicity with authoritarianism will not be shielded from scrutiny---This approach reinforces judicial independence, ensures accountability for regime-orchestrated injustices, and establishes a precedent for discrediting flawed judicial decisions rendered under oppressive regimes---Such actions underscore the judiciary's commitment to constitutional principles, reminding past and future judges of their duties and the need to resist authoritarian pressure---Ultimately, this helps safeguard democracy, the rule of law and human rights.

Juan Méndez, *Constitutionalism and Transitional Justice*, (2012); Vinjamuri and Snyder, *Law and Politics in Transitional Justice*, (2015); Hakeem Yusuf, *Transitional Justice, Judicial Accountability and the Rule of Law*, (2010); *General (R) Pervez Musharraf v. Federation of Pakistan* PLD 2024 SC 497; *Taufiq Asif v. General (R) Pervez Musharraf* PLD 2024 SC 610; *Sindh High Court Bar Association v. Federation of Pakistan* PLD 2009 SC 789 and *Nawaz Sharif v. State* PLD 2009 SC 814 ref.

(i) Constitution of Pakistan---

---Arts. 4, 9, 10A & 186---Reference by the President under Article 186 of the Constitution to revisit the cases of Zulfiqar Ali Bhutto (former Prime Minister of Pakistan) reported as *Zulfikar Ali Bhutto and 3 others v. The State* (PLD 1979 Supreme Court 38) and *Zulfikar Ali Bhutto v. The State* (PLD 1979 Supreme Court 53)---‘Political trial’---Victim of ‘judicial murder’---Murder trial of Zulfiqar Ali Bhutto (“Mr. Bhutto”) by the Trial Court (the Lahore High Court) and the appellate court (the Supreme Court)---Requirements of due process and fair trial not met---Violations of procedural due process and fair trial requirements stated.

The murder trial of Mr. Zulfiqar Ali Bhutto, a former Prime Minister of Pakistan, serves as a classic example of a political trial, illustrating how such trials can be manipulated to advance authoritarian designs. Bhutto's trial effectively served as a potent and notorious “judicial tool” for strengthening General Zia's authoritarian regime, aimed at suppressing political resistance, eliminating opposition and ensuring the consolidation of power. It helped to entrench the repressive military authoritarian regime under which it was conducted. Instead of independent, substantive evidence, the prosecution relied heavily on confessional statements given by, or procured from, Bhutto's former associates—accomplices turned approvers.

Likewise, several violations of procedural due process and fair trial requirements were committed to achieve politically desirable outcomes. These included the unauthorized reinvestigation of the case, which had previously been closed by an order of the Magistrate concerned; the surreptitious and unlawful transfer of the investigation from the regular investigating agency (Provincial Police) to the Federal Investigation Agency; the transfer of the trial from the regular Trial Court (Sessions Court) to the High Court without adherence to legal requirements; the unjustified cancellation of bail previously granted to Bhutto by a Single Bench of the Lahore High Court; the determination of Bhutto's recusal application by judges other than the one whose recusal was sought, without addressing the instances cited to demonstrate the bias and prejudice of the judge (Justice Maulvi Mushtaq); the composition of the trial and appellate court benches, both of which were headed by judges (Justice Maulvi Mushtaq and Justice Anwar-ul-Haq) who harboured personal grievances against Bhutto due to being passed over for appointments as Chief Justice of their respective courts—the Lahore High Court (Trial Court) and the Supreme Court (appellate court); and the unwarranted reconstitution of the appellate court bench from nine judges to seven judges. It is an established principle that justice must not only be done but must also manifestly and undoubtedly be seen to be done. The infringement of this fundamental principle also constitutes a violation of due process and fair trial requirements. Because of these glaring violations, Bhutto is rightly regarded as the victim of “unfair judicial proceedings” and “legalized political murder”—also referred to as “judicial murder”. Both the obvious procedural irregularities and illegalities in the reinvestigation and trial, as well as the biased composition of the trial and appellate court

benches, rendered the verdict illegitimate and undermined the independence and impartiality of the superior courts (High Courts and the Supreme Court) for years to come.

Rex v. Sussex Justices [1924] 1 KB 256; Ramsey Clark, *Injustice against Bhutto in 2 Courts*, (1979) and Ian Talbot, *Pakistan: A Modern History*, (1998) and Paula Newberg, *Judging the State: Courts and Constitutional Politics in Pakistan*, (1995) ref.

The Constitution and the law provide no mechanism to set aside the judgment by which Bhutto was convicted and sentenced, as that judgment attained finality following the dismissal of the review petition by the Supreme Court. Furthermore, in its advisory jurisdiction under Article 186 of the Constitution, the Supreme Court lacks the authority to reappraise the evidence or overturn a final decision. However, after carefully examining the record of the reinvestigation and trial proceedings, the Supreme Court concluded—and so stated—that the trial proceedings in the Lahore High Court and the appellate proceedings in the Supreme Court of Pakistan did not meet the requirements of the Fundamental Right to a fair trial and due process as enshrined in Articles 4 and 9 of the Constitution, which were later reinforced as a separate and independent Fundamental Right under Article 10A of the Constitution. Supreme Court’s expression of this opinion reflects a commitment to confront past missteps and fallibilities during an authoritarian regime with humility, embodying a spirit of self-accountability and underscoring our dedication to ensuring that transitional justice shall be served with unwavering integrity and fidelity to the Constitution and the law.

Benazir Bhutto v. Federation of Pakistan PLD 1988 SC 416; Jubilee Insurance v. NBP PLD 1999 SC 1126; Nadeem Anwar v. NAB PLD 2008 SC 645 and Riaz-Ul-Haq v. Federation of Pakistan PLD 2013 SC 501 ref.

Per Yahya Afridi, J.; agreeing with Syed Hasan Azhar Rizvi, J. and partially agreeing with Qazi Faez Isa, CJ.

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

---Ss. 411-A & 526---Penal Code (XLV of 1860), S. 302(b)---Constitution of Pakistan, Art. 185(2)(b)---Trial by the High Court---Scope---Observation in the majority opinion authored by the Chief Justice (Qazi Faez Isa, J.), that Article 185(2)(b) of the Constitution and sections 411-A and 526 of the Code of Criminal Procedure, 1898 do not permit the High Court to conduct a murder trial – is untenable, as it is founded on a misconception of these provisions. [Minority view]

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

---S. 376 & Chapt. XXVII---Death sentence---Confirmation by the High Court---Scope---Chapter XXVII of the Code of Criminal Procedure, 1898 does not extend to death sentences passed by the High Court in the exercise of its original criminal jurisdiction---These provisions do not necessitate confirmation of such sentences or lead to the forfeiture of the right of appeal. [Minority view]

Per Syed Hasan Azhar Rizvi J.; partially agreeing with Qazi Faez Isa, CJ. with his own reasons

(l) Judgment---

---Additional/supplementary notes or opinions of Judges in a case---Significance---It is the hallmark of a robust judicial system to allow for the expression of supplementary views that may fortify the decision's legal foundation and contribute to the richness of our legal tradition.

(m) Constitution of Pakistan---

---Arts. 4, 9, 10A & 186---Penal Code (XLV of 1860), Ss. 302, 307, 120B & 109---Criminal Procedure Code (V of 1898), S. 526---Reference by the President under Article 186 of the Constitution to revisit the cases of Zulfikar Ali Bhutto (former Prime Minister of Pakistan) reported as Zulfikar Ali Bhutto and 3 others v. The State (PLD 1979 Supreme Court 38) and Zulfikar Ali Bhutto v. The State (PLD 1979 Supreme Court 53)---Murder trial of Zulfikar Ali Bhutto (“Mr. Bhutto”) by the Trial Court (the Lahore High Court) and the appellate court (the Supreme Court)---Requirements of due process and fair trial not met---Biased and impartial conduct of the Acting Chief Justice of the High Court towards Mr. Bhutto---Non-observance of prescribed procedure under the Code of Criminal Procedure, 1898 ('Cr.P.C.') by the High Court---Proceedings of the trial held in-camera without any justification---Necessary material to prepare defence effectively not provided---Denial of right to defend---Discrepancies and irregularities in the testimony of the approver---Lack of corroboration of evidence provided by the approver---Evidence of material witnesses full of contradictions,

improvements and improbabilities---Motive remaining unproved---Negative report of ballistics experts---Major constitutional and legal lapses that undermined the proceedings of trial of Mr. Bhutto before the High Court as well as the appeal filed by him before the Supreme Court stated.

Syed Ali Nawaz Gardezi v. Lt.-Col. Muhammad Yusuf PLD 1963 SC 51 ref.

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

---Art. 129, Illustration (b)---Approver, evidence of---Principles---Testimony of an approver is to be scrutinized with care and caution---Court should be doubly sure that his (approver's) evidence is corroborated in material particulars by reliable evidence---Principles for appreciating the evidence of an approver listed. Following are principles for appreciating the evidence of an approver:

- (i) That if a statement of fact made by an accused in a confession is of the nature that if it is assumed to be true, it would negate the offence alleged to be confessed, it is called an exculpatory confession.
- (ii) That a statement of an accused that contains self-exculpatory matter cannot amount to confession.
- (iii) That a retracted confession is sufficient to sustain a conviction for a capital offence, if the Court is of the view that the same is voluntary and is true, but as a rule of prudence, it has been consistently held by the superior Courts that the same should not be acted upon unless corroborated by some other reliable evidence in material particulars.
- (iv) That though the confession of a co-accused cannot be made the foundation of conviction but it may be used in support of other evidence.
- (v) That the confession of a co-accused is evidence of a weak character.
- (vi) That under Islamic jurisprudence, in order to make a confession reliable, it should be voluntarily made and not on account of any coercion, duress or violence.
- (vii) That any delay in recording of a confession may, or may not, be fatal as to the evidentiary value of a retracted confession.
- (viii) That any lapse on the administrative side on the part of a Magistrate recording a confession, may not be fatal as to the evidentiary value of such confession provided the Court is satisfied that the lapses on his part have not, in any way, adversely affected the voluntariness or truthfulness of the confession.
- (ix) That if an accomplice's evidence is not corroborated in material respects, it cannot be acted upon and that the evidence of an accomplice cannot be used to corroborate evidence of another accomplice.

Ch. Muhammad Yaqoob and others v. The State 1992 SCMR 1983 ref.

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

---Ss. 411-A & 526---Penal Code (XLV of 1860), S. 302(b)---Constitution of Pakistan, Art. 185(2)(b)---Trial by the High Court---Scope---Observation in the majority opinion authored by the Chief Justice (Qazi Faez Isa, J.), that “Article 185(2)(b) of the Constitution and sections 411-A and 526 of the Code of Criminal Procedure, 1898 do permit trial to be conducted by the High Court, but these provisions do not provide for a High Court to conduct a murder trial”---His Lordship opined that such observation in the majority opinion was untenable under the law being based on a misconception and incorrect understanding of the true meaning and purpose of Article 185(2)(b) of the Constitution and sections 411-A and 526 of the Cr.P.C. [Minority view]

Raja Khurram Ali Khan and another v. Tayyaba Bibi and another 2019 YLR 98 and Raja Khurram Ali Khan and 2 others v. Tayyaba Bibi and another PLD 2020 SC 146 ref.

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

---Ss. 374, 375, 376, 377 & Chapt. XXVII---Death sentence---Confirmation by the High Court---Scope---On a reference for the confirmation of the sentence of death, the High Court is required to proceed in accordance with sections 375 and 376, 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---When the High Court passes a sentence of death in its original criminal jurisdiction, Chapter XXVII of Cr.P.C. becomes redundant and inoperative---Chapter XXVII of the Cr.P.C does not extend to death sentences passed by the

High Court in the exercise of its original criminal jurisdiction---These provisions do not necessitate confirmation of such sentences or lead to the forfeiture of the right of appeal. [Minority view]
Per Muhammad Ali Mazhar J.; agreeing with Qazi Faez Isa, C.J. with his own reasons

(q) Constitution of Pakistan---

---Art. 186---Advisory jurisdiction of the Supreme Court under Article 186 of the Constitution---Scope---
While the opinion rendered by the Supreme Court under its advisory jurisdiction may not be binding, it carries significant credence and persuasive value---It is rendered after much deliberation, thoughtfulness, and appreciation of the questions forwarded by the President consistent with the constitutional obligations and judicial propriety---Such opinions ought to be respected with due weight and esteem by all organs of the State---However, concomitantly, questions transmitted for opinion in the reference should not be ambiguous, indeterminate, or inexplicable to avoid the possibility of the Supreme Court returning the reference unanswered.

Reference No. 2 of 2005 PLD 2005 SC 873 ref.

(r) Constitution of Pakistan---

---Arts. 4, 9, 10A & 186---Penal Code (XLV of 1860), Ss. 302, 307, 120B & 109---Criminal Procedure Code (V of 1898), S. 526---Reference by the President under Article 186 of the Constitution to revisit the cases of Zulfiqar Ali Bhutto (former Prime Minister of Pakistan) reported as Zulfikar Ali Bhutto and 3 others v. The State (PLD 1979 Supreme Court 38) and Zulfikar Ali Bhutto v. The State (PLD 1979 Supreme Court 53)---Murder trial of Zulfiqar Ali Bhutto ("Mr. Bhutto") by the Trial Court (the Lahore High Court) and the appellate court (the Supreme Court)---Requirements of due process and fair trial not met---Violation of principles of natural justice---Reinvestigation in a closed case ordered mechanically without identifying lapses in the first investigation---Transfer of case from Sessions Court to the High Court by the then Acting Chief Justice of High Court with malice and without notice to accused persons---Personal bias and preconceived notions of Judges sitting on the Bench of the Trial Court (High Court)---Evidence of approver not corroborated by reliable evidence---One right of appeal lost/forfeited due to trial in the High Court---Appellate court (Supreme Court) failing to consider mitigating circumstances---Detailed reasons for failure to ensure a fair trial and due process stated.

Rex v. Sussex Justices (1924) 1 KB 256; Ms. Benazir Bhutto v. The President of Pakistan 1992 SCMR 140; Islamic Republic of Pakistan v. Abdul Wali Khan PLD 1976 SC 57; President v. Shaukat Ali PLD 1971 SC 585; Government of NWFP v. Dr. Hussain Ahmed Haroon 2003 SCMR 104; Asif Ali Zardari v. The State PLD 2001 SC 568; State of Puniab v. Davinder Pal Singh Bhullar AIR 2012 SC 364; Gullavalli Nageswararao etc. v. The State of Andhra Pradesh and others AIR 1959 SC 1376; Ranjit Thakur v. Union of India and others AIR 1987 SC 2386; Bhajan Lai, Chief Minister, Haryana v. Messrs Jindal Strips Ltd. and others (1994) 6 SCC 19; Justice P.D. Dinakaran v. Hon'ble Judges Inquiry Committee (2011) 8 SCC 380; A.K. Kraipak v. Union of India AIR 1970 SC 150; Davidson v. Scottish Ministers (2004) UKHL 34; Webb and Hay v. R (1993) HCA 30; R v. Sussex Justices, ex parte McCarthy (1923) All ER 233; R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 2) (1999) 1 All ER 577; Taylor and another v. Lawrence and another (2002) EWCA Civ 90; Junaid Wazir v. Superintendent of Police 2024 SCMR 181; Federation of Pakistan v. Zahid Malik 2023 SCMR 603; Usman Ghani v. The Chief Post Master, GPO Karachi 2022 SCMR 745; Capital Development Authority v. Shabir Hussain 2022 SCMR 627; Raja Muhammad Shahid v. The Inspector General of Police 2023 SCMR 1135; Muhammad Yaseen v. Province of Sindh 2024 PLC (C.S.) 111; Government of Balochistan v. Ghulam Rasool 2024 SCMR 1155 and Inspector General of Police, Quetta v. Fida Muhammad 2022 SCMR 1583 ref.

(s) Constitution of Pakistan---

---Arts. 4, 9, 10A & 186---Reference by the President under Article 186 of the Constitution to revisit the cases of Zulfiqar Ali Bhutto (former Prime Minister of Pakistan) reported as Zulfikar Ali Bhutto and 3 others v. The State (PLD 1979 Supreme Court 38) and Zulfikar Ali Bhutto v. The State (PLD 1979 Supreme Court 53)---Murder trial of Zulfiqar Ali Bhutto by the Trial Court (the Lahore High Court) and the appellate court (the Supreme Court)---One of the questions framed by the Supreme Court in the Presidential Reference was

whether the decision in the case of murder trial against Zulfiqar Ali Bhutto fulfils the requirements of Islamic laws as codified in the Holy Quran and the Sunnah of the Holy Prophet (SAW)? ;if so, whether present case is covered by doctrine of repentance specifically mentioned in the following Suras of Holy Quran: (i) Sura Al-Nisa, verses 17 and 18; Sura Al-Baqara, verses 159, 160 and 222; Sura Al-Maida, verse 39; Sura Al-Aaraaf, verse 153; Sura Al-Nepal, verse 119; Sura Al-Taha, verse 82, as well as Sunan Ibn-e-Maaja, Chapter 171, Hadith No. 395; and, what are effects and consequences of doctrine – Re: Repentance---His Lordship observed that no opinion was rendered by the Supreme Court for this question, which was left unanswered for the valid reason that no assistance was provided---Since the question on the doctrine of repentance was framed with reference to various verses of the Holy Quran, forming substantial segment of the Presidential Reference, it should not remain untouched or unanswered---The unresolved question is why the question regarding the doctrine of repentance was framed by the Supreme Court?---Who had to or has to repent for the unfair and biased trial?---Was it the departed souls who tried the case in the High Court? ; or those who heard the appeal and review? ; or the bench that entertained and framed the question? ;or the bench members who rendered their opinion years after the Reference was instituted?---Supreme Court unanimously noted various lapses and biases in the High Court's murder trial, ultimately concluding that the proceedings of the trial by the Lahore High Court and the appeal by the Supreme Court failed to meet the constitutional requirements of a fair trial and due process enshrined in Articles 4, 9, and later guaranteed as a separate and independent fundamental right under Article 10A of the Constitution---Not only it demonstrates some sought of remorse though not explicitly articulated but it also implies a recognition of repentance for the failure to ensure a fair trial and due process, even as this question of the Presidential Reference remains unanswered or undecided.

[Minority view]

In Attendance:

On behalf of the President:

Mansoor Usman Awan,
Attorney-General for Pakistan assisted by
Ch. Aamir Rehman,
Additional Attorney-General,
Malik Javed Iqbal Wains,
Additional Attorney-General,
Raja M. Shafqat Abbasi,
Deputy Attorney-General and
Ms. Marium Ali Abbasi, Advocate.

On Court Notice:

Khalid Ishaq, Advocate-General, Punjab,
assisted by Sanaullah Zahid, Addl. AG.
Hassan Akbar, Advocate-General, Sindh
assisted by Qazi M. Bashir, Addl. AG.
Amir Javed, Advocate-General,
Khyber Pakhtunkhwa, assisted by
Sultan Mazhar Sher Khan, Addl. AG.
Asif Reki, Advocate-General, Balochistan
assisted by M. Ayaz Swati, Addl. AG.

On behalf of the LR's of the

late Zulfiqar Ali Bhutto:

Farooq H. Naek, Sr. Advocate Supreme Court, assisted by
Iftikhar Shah and Sheraz Shaukat Rajpar, Advocates.
(representing grandson Bilawal Bhutto Zardari)
Mian Raza Rabbani, Advocate Supreme Court, assisted by
Zeeshan Abdullah, Advocate.

(representing daughter Ms. Sanam Bhutto and grandchildren Ms. Bakhtawar Bhutto and Ms. Aseefa Bhutto)

Zahid F. Ibrahim, Advocate Supreme Court, assisted by
Altamash Arab, Advocate.

(representing grandchildren Ms. Fatima Bhutto and Zulfiqar Ali Bhutto)

Amici Curiae:

Manzoor Ahmad Malik,
Hon'ble former Judge,
assisted by Ansar Nawaz Mirza, Advocate Supreme Court,
Haider Rasul Mirza, Advocate Supreme Court and
Shahryar Riaz, Advocate High Court.

M. Makhdoom Ali Khan, Sr. Advocate Supreme Court,
assisted by Saad Mumtaz Hashmi, Advocate Supreme Court.

Khalid Jawed Khan, Advocate Supreme Court.

Ch. Aitzaz Ahsan, Sr. Advocate Supreme Court,
assisted by Ms. Zunaira Fayyaz Siwia, Advocate and
Qaiser Nawaz, Advocate.

Assadullah Khan Chamkani, Advocate Supreme Court,
assisted by M. Tariq Khan Hoti, Advocate Supreme Court.

Salahuddin Ahmed, Advocate Supreme Court,
assisted by Ehsan Malik and Aman Aftab, Advocates.

For Complainant:

Ahmed Raza Khan Kasuri, Advocate Supreme Court.
(in person)

For SCBA:

Ali Imran, Advocate Supreme Court.

Dates of hearing: 12th December, 2023, 8th January, 20th, 26th 27th, 28th February and 4th March, 2024.

Opinion

Qazi Faez Isa, CJ.

Background

1. The Federal Cabinet¹ headed by the Prime Minister decided to file a reference under Article 186 of the Constitution of the Islamic Republic of Pakistan ('the Constitution') 'in respect of the proceedings of the judicial process in the case of trial Shaheed Zulfiqar Ali Bhutto, former Prime Minister' ('Mr. Bhutto'), and the Prime Minister advised² the President of Pakistan ('the President') to file the reference. Resultantly, the President submitted a reference to the Supreme Court,³ which was numbered as Reference No. 1 of 2011 ('the Reference').

Seeking the Opinion of the Supreme Court

2. Article 186 of the Constitution, pursuant to which the Reference was filed, states that:

'186. (1) If, at any time, the President considers that it is desirable to obtain the opinion of the Supreme Court on any question of law which he considers of public importance, he may refer the question to the Supreme Court for consideration.

(2) The Supreme Court shall consider a question so referred and report its opinion on the question to the President.'

Questions Formulated for Opinion

3. The following questions for the opinion of the Court were formulated:

'1. Whether the decision of the Lahore High Court as well as the Supreme Court of Pakistan in the murder trial against Shaheed Zulfiqar Ali Bhutto meets the requirements of fundamental rights as guaranteed under

Article 4, sub-Articles (1) and (2) (a), Article 8, Article 9, Article 10A/due process, Article 14, Article 25 of the Constitution of the Islamic Republic of Pakistan, 1973? If it does not, its effect and consequences?

2. Whether the conviction leading to execution of Shaheed Zulfiqar Ali Bhutto could be termed as a decision of the Supreme Court binding on all other courts being based upon or enunciating the principle of law in terms of Article 189 of the Constitution of the Islamic Republic of Pakistan, 1973? If not, its effect and consequences?

3. Whether in the peculiar circumstances of this case awarding and maintaining of the death sentence was justified or it could amount to deliberate murder keeping in view the glaring bias against Shaheed Zulfiqar Ali Bhutto?

4. Whether the decision in the case of murder trial against Shaheed Zulfiqar Ali Bhutto fulfills the requirements of Islamic laws as codified in the Holy Quran and the Sunnah of the Holy Prophet (SAW)? If so, whether present case is covered by doctrine of repentance specifically mentioned in the following Suras of Holy Quran:

(a) Sura Al-Nisa: verses 17 & 18

Sura Al-Baqara: verses 159, 160 and 222 Sura Al-Maida: verse 39

Sura Al-Aaraaf: verse 153

Sura Al-Nehal verse 119

Sura Al-Taha: verse 82

as well as

(b) Sunan Ibn-e-Maaja, Chapter 171, Hadith No. 395

What are effects and consequences of doctrine Re: Repentance

5. Whether on the basis of conclusions arrived at and inferences drawn from the evidence/ material in the case an order for conviction and sentence against Shaheed Zulfiqar Ali Bhutto could have been recorded?'
Larger Bench

4. The Supreme Court⁴ ordered that a larger Bench should be constituted to hear the Reference. Resultantly a larger Bench, comprising of the Chief Justice and eight Judges, was constituted, and it last heard the Reference on 12 November 2012; the Reference was not fixed in Court for eleven years. All the members of this Court who were hearing the Reference have retired.

Rehearing of the Reference

5. The Reference was again fixed in Court for hearing on 12 December 2023. This Court noted that, 'A number of other presidential references, filed later under Article 186, of the Constitution, were taken up for hearing and decided by this Court,⁵ but this Presidential Reference remains pending, it merits determination as early as possible.' It would be appropriate to reproduce the following paragraphs from the order passed on 12 December 2023:

'2. Learned Mr. Farooq H. Naek referred to an application (C.M.A. No.8622/2018) filed on behalf of Mr. Bilawal Bhutto Zardari, the grandson of the late Mr. Bhutto and states he wants to be represented herein. We are informed that there is only one surviving daughter of the late Mr. Bhutto and he has eight grandchildren. The application is allowed and learned Mr. Naek may represent Mr. Bilawal Bhutto Zardari and assist this Court. If Mr. Bhutto's daughter and any of his grandchildren also want to be represented they may engage counsel. Mr. Naek states that he has also filed an application (CMA No. 10492/2023) seeking live telecast of these proceedings, however, the committee constituted in this regard had before filing of the application already made requisite arrangements and recommended that the Presidential Reference be broadcast, and proceedings are being broadcast,⁶ therefore, this application has become infructuous and is disposed of.

3. Learned Mr. Naek refers to the report of Justice Shafi-ur-Rehman, who was then a Judge of the Lahore High Court, regarding the investigation into the murder of Mr. Mohammad Ahmed Khan, the father of the complainant, Mr. Ahmed Raza Khan Kasuri. He requested that he be provided its copy. A Tribunal of inquiry was constituted by the Government of Punjab in exercise of its powers conferred by section 3 of the West Pakistan Tribunals of Inquiry Ordinance, 1969.⁷ The Report of the Tribunal is dated 22 February 1975 and

comprises of 30 pages, and is mentioned in the judgment of the Lahore High Court⁸ and also in the appeal therefrom.⁹

4. The learned Attorney-General for Pakistan ('AG') was asked whether any of the successive Presidents or the Federal Government sought to withdraw the Presidential Reference or wants to do so now, and the learned AG stated that this was not done nor is this sought to be done now.

5. Learned AG was asked to read the Presidential Reference, which he did. He also read some of the orders of this Court, including order dated 21 April 2011¹⁰ which formulated questions for the opinion of this Court. A number of amici curiae were appointed, some of whom have passed away and others we are told are indisposed. Learned Mr. Ali Ahmed Kurd, an amicus appointed by this Court, states that he will be rendering assistance. We are also informed that learned Mr. Makhdoom Ali Khan, another amicus appointed by this Court, will also be rendering assistance. Notice had also been issued to the Supreme Court Bar Association ('SCBA') and the late Ms. Asma Jahangir represented SCBA; if SCBA want to be represented before this Court they may nominate a counsel to assist us. We also appoint learned Messrs Khalid Javed Khan, Salahuddin Ahmed and Zahid F. Ebrahim as amici curiae. Mr. Yasser Kureshi, an academic working at Oxford University, United Kingdom, and Ms. Reema Omer of the International Commission of Jurists are also appointed as amici curiae. They are appointed to particularly attend to the constitutional and legal aspects of the matter.

6. The first and foremost constitutional and legal points, in addition to those recorded in order dated 21 April 2011, that require consideration are:

- (1) Whether the Presidential Reference is maintainable under Article 186 of the Constitution;
- (2) Whether the Presidential Reference requires a factual inquiry, and if so, whether under Article 186 of the Constitution an opinion can be given in this regard;
- (3) The constitutional-legal position of the trial and appeal, and its credibility/ legitimacy when the person being tried was removed from power by a usurper who himself assumed power and then launched the prosecution of Mr. Bhutto in a criminal case which was filed as 'untraced'; and
- (4) Were certain judge(s) removed from the trial and/or hearing the appeal to secure a particular result.

7. If the aforesaid aspect is successfully attended to then we will need to consider the trial and appeal which will require expertise in criminal law and procedure. Justice Manzoor Ahmed Malik, former Judge of the Supreme Court, and Justice Assadullah Khan Chamkani, a former Judge of the Peshawar High Court, have vast experience and we want to benefit from their knowledge in this regard, therefore, they are appointed as amici curiae, who may either submit a written brief and/or address us in person. We note that learned Mr. Khawaja Haris Ahmed was the Advocate-General, Punjab and was associated with the Presidential Reference when it was earlier heard and is also a criminal law expert, therefore, he is also appointed as amicus curiae to assist with the criminal law and procedure.

8. With regard to the criminal law aspects the learned amici curiae may assist on the following:

- (1) If, and when, can a murder trial be conducted by the High Court, and to cite local and international precedents;
- (2) Was the murder-trial being conducted by the High Court objected to, and if it was, how was the objection attended to;
- (3) The consequences, if any, of departing from the usual mode of trial;
- (4) The admissibility or otherwise of a confessional statement of an approver and to what extent can it be used against a co-accused;
- (5) Was there any legal bias, and if so its effects; and
- (6) What were the facts leading to reopening the investigation, and was it because fresh evidence had been discovered or was it on account of the usurper securing his position.

9. The Presidential Reference refers to an interview, which we are told was given to Mr. Iftikhar Ahmed of Geo television by Justice Nasim Hassan Shah, who was on the Bench of the Supreme Court which decided the appeal and review¹¹. Mr. Ahmed Raza Kasuri also refers to his application (C.M.A. No. 5788/2011) and

states that he has filed extracts from a book written by the same learned Judge - Constitution, Law and Pakistan Affairs. Mr. Naek states that Justice Dorab Patel had also given an interview about the case.

10. Office is directed to send copies of the Presidential Reference, all orders and the Report of the Tribunal to the learned amici curiae who may attend to the questions noted above, in order dated 21 April 2011 and in the Presidential Reference. The learned amici may submit their respective written opinions on all or any of the said matters, and on any other aspect which they consider relevant, by Friday, 5 January 2024.'

6. We heard this Reference on 8 January, 20, 26, 27 and 28 February and 4 March 2024. On 6 March 2024 we announced our Opinion under Article 186 of the Constitution which read as follows:

'In the course of performing our core duty to administer justice 'in accordance with the Constitution of the Islamic Republic of Pakistan and the law', we (judges) are bound to 'do right to all manner of people, according to law, without fear or favour, affection or ill-will.'¹² There have been some cases in our judicial history that created a public perception that either fear or favour deterred the performance of our duty to administer justice in accordance with the law. We must, therefore, be willing to confront our past missteps and fallibilities with humility, in the spirit of self-accountability, and as a testament to our commitment to ensure that justice shall be served with unwavering integrity and fidelity to the law. We cannot correct ourselves and progress in the right direction until we acknowledge our past mistakes.

2. The advisory jurisdiction, under Article 186 of the Constitution, requires this Court to render an opinion on any question of law of public importance referred to by the President. To us, the question of law, in essence, is whether the requirements of due process and fair trial were complied with in the murder trial of Mr. Zulfiqar Ali Bhutto ("Mr. Bhutto"), the former Prime Minister of Pakistan, by the trial court (the Lahore High Court) and the appellate court (the Supreme Court). This question we approach and answer considering whether the trial court and the appellate court attended to and dealt with the requirements of due process and fair trial.

3. The reference filed by the President of Pakistan has provided us an opportunity to reflect upon the proceedings of the trial, conviction and death sentence of Mr. Bhutto, under the regime of the military dictator General Zia Ul Haq. The reference was filed during the government of the political party founded by Mr. Bhutto but the successive governments of other major political parties carried forward this inquiry and did not opt to withdraw the reference. This collective interest reflects the widespread desire of the people of Pakistan to seek the opinion of this Court on whether Mr. Bhutto was afforded a fair trial and due process for his trial for the murder of Mr. Muhammad Ahmed Khan Kasuri.

4. With the able assistance of the eminent legal minds of the country, we for the reasons to be recorded later and subject to amplifications and explanations made therein, render an opinion on the referred questions in the following terms:

Question (1)

Whether the decision of the Lahore High Court as well as the Supreme Court of Pakistan in the murder trial against Shaheed Zulfiqar Ali Bhutto meets the requirements of fundamental rights as guaranteed under Article 4, sub-Articles (1) and (2) (a), Article 8, Article 9, Article 10A/due process, Article 14, Article 25 of the Constitution of the Islamic Republic of Pakistan, 1973? If it does not, its effect and consequences?

Opinion

(i) The proceedings of the trial by the Lahore High Court and of the appeal by the Supreme Court of Pakistan do not meet the requirements of the Fundamental Right to a fair trial and due process enshrined in Articles 4 and 9 of the Constitution and later guaranteed as a separate and independent Fundamental Right under Article 10A of the Constitution.

(ii) The Constitution and the law do not provide a mechanism to set aside the judgment whereby Mr. Bhutto was convicted and sentenced; the said judgment attained finality after the dismissal of the review petition by this Court.

Question (2)

Whether the conviction leading to execution of Shaheed Zulfiqar Ali Bhutto could be termed as a decision of the Supreme Court binding on all other courts being based upon or enunciating the principle of

law in terms of Article 189 of the Constitution of the Islamic Republic of Pakistan, 1973? If not, its effect and consequences?

Opinion

Referenced questions do not specify the principle of law enunciated by this Court in the Zulfiqar Ali Bhutto case regarding which our opinion is sought. Therefore, it cannot be answered whether any principle of law enunciated in the Zulfiqar Ali Bhutto case has already been dissented to or overruled.

Questions (3) and (5)

Whether in the peculiar circumstances of this case awarding and maintaining of the death sentence was justified or it could amount to deliberate murder keeping in view the glaring bias against Shaheed Zulfiqar Ali Bhutto?

Whether on the basis of conclusions arrived at and inferences drawn from the evidence/ material in the case an order for conviction and sentence against Shaheed Zulfiqar Ali Bhutto could have been recorded?

Opinion

In its advisory jurisdiction under Article 186 of the Constitution, this Court cannot reappraise the evidence and undo the decision of the case. However, in our detailed reasons, we shall identify the major constitutional and legal lapses that had occurred with respect to fair trial and due process.

Question (4)

Whether the decision in the case of murder trial against Shaheed Zulfiqar Ali Bhutto fulfils the requirements of Islamic laws as codified in the Holy Quran and the Sunnah of the Holy Prophet (SAW)? If so, whether present case is covered by doctrine of repentance specifically mentioned in the following Suras of Holy Quran:

(a) Sura Al-Nisa, verses 17 and 18; Sura Al-Baqara, verses 159, 160 and 222; Sura Al-Maida, verse 39; Sura Al-Aaraaf, verse 153; Sura Al-Nahl, verse 119; Sura Al-Taha, verse 82; as well as (b) Sunan Ibn-e-Maaja, Chapter 171, Hadith No. 395.

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Opinion

We were not rendered any assistance on this question, therefore, it would be inappropriate to render an opinion.'

Retirement of Senior Puisne Judge Sardar Tariq Masood

7. Sardar Tariq Masood, J was the senior puisne judge when the Reference was heard and the above opinion was rendered, however, he retired on 10 March 2024. It is commonsensical that, if a Judge has already signed a written opinion/short order, but then retires, he can sign/give the detailed reasons post-retirement. This also prevents the unnecessary wastage of public resources and Court time, which would happen if the Bench was to be reconstituted (after the retirement of a Judge) and the entire matter heard again. A Supreme Court Bench comprising of thirteen Judges¹³ held that Judges who had retired before signing the detailed reasons could do so after their retirement.

Facts of the case

8. On 11 November 1974 at 12.30 am Mr. Muhammad Ahmad Khan ('Mr. Khan'), his wife, his wife's sister and his son Mr. Ahmad Raza Kasuri ('Mr. Kasuri') were returning home after having attended a wedding in a car driven by Mr. Kasuri when it was fired upon and a bullet struck Mr. Khan in the head, which resulted in his death. The FIR¹⁴ was registered on the written complaint of Mr. Kasuri ('the Complainant'), who stated that he suspected that he (and not his father) was the intended target because he was vociferously opposed to the government party (Pakistan Peoples Party) of Mr. Bhutto. Attributing motive to Mr. Bhutto, he stated that Mr. Bhutto had addressed him in the National Assembly (of which both were members - MNAs) saying that he (Mr. Kasuri) had exhausted his patience (' ') and that he (Mr. Bhutto) had said that he had had enough of Mr. Kasuri (' ').

Police Investigation of the Crime

9. The Police commenced its investigation¹⁵ of the crime but the perpetrators could not be unearthed. Therefore, the Senior Superintendent of Police ('SSP') transferred the investigation to a specialized

investigation unit, that is, to the Crime Investigation Agency ('CIA').¹⁶ However, the CIA also failed to trace the criminals, and after nine and a half months submitted its report recommending the closure of the investigation.¹⁷

Closing the Investigation

10. The Police could not make any progress in discovering those who had committed the crime which had killed Mr. Khan. The CIA too drew a blank. Therefore, a report was prepared by Inspector Abdul Hameed of CIA, Lahore which was also signed on 19 March 1976 by the Deputy Superintendent of Police ('DSP'), Ichhra Circle, Lahore within the limits of which the crime was committed, and on 24 April 1976 by the Superintendent of Police ('SP'), Cantonment, Lahore, recommending that the investigation be closed. The Magistrate ordered the closure of the investigation on 3 May 1976. Neither Mr. Kasuri, nor the other legal heirs of the late Mr. Khan, nor anyone else objected to the closure of the investigation. The Magistrate's order closing the investigation was never challenged.

Tribunal of Inquiry

11. The Government of Punjab appointed a Judge of the Lahore High Court as the Tribunal¹⁸ to inquire into:

'NOTIFICATION

The 13th November 1974

No. SOG-III-6-309/74 - Whereas the Government of the Punjab is of the opinion that it is necessary to appoint a Tribunal for the purpose of making an inquiry into the incident which took place at Shadman-Shah Jamal Round-about, nearly four furlongs to the north of P. S. Ichhra, Lahore on the night between 10th and 11th November, 1974 at 12-30 a.m. (night):

Now, therefore, in exercise of the powers conferred on him by Section 3 of the West Pakistan Tribunals of Inquiry Ordinance, 1969 (Ordinance II of 1969), the Governor of the Punjab is pleased to appoint Mr. Justice Shafi-ur-Rehman, Judge, Lahore High Court as the Tribunal.

2. The terms of reference of the Tribunal shall be-

(i) To inquire into the incident which took place on the night between 10th and 11th November, 1974 at Shadman-Shah Jamal Round-about, nearly four furlongs to the north of P. S. Ichhra, Lahore leading to the death of Nawabzada Muhammad Ahmed Khan, resident of 130-J, Model Town, Lahore, father of Mr. Ahmed Raza Khan Qasuri, MNA, in which connection FIR No. 402/74 was recorded on 11th November 1974 at P. S. Ichhra, Lahore

(ii) To examine the investigations conducted by the Police in the case and give such directions as may be appropriate.

3. The Tribunal will finalize the inquiry and submit his report within one month.

F. K. BANDIAL

Chief Secretary.'

12. The Tribunal submitted Report of the Tribunal on 22 February 1975, which found that:

'15. The only motive mentioned in the FIR accounting for the occurrence is the affiliations and the political activities of the complainant, Mr. Ahmed Reza Khan Kasuri, and the extreme exasperation and dislike for him of the Prime Minister publicly expressed on the floor of the National Assembly. In explaining the mention of such a motive in the FIR the complainant made it clear that it does not necessarily mean that he was subjected to this and the precedent attacks directly at the bidding of the Prime Minister or that the attack was organized by someone in Government or Party. He said that on political differences, whatever their nature or extent, such a public condemnation by the Prime Minister, who happens to be, for the time being, the repository and source of all political and governmental powers, could prompt a die-hard, an over enthusiastic person, or a trigger happy individual, in the government or outside, of the party or not, to accomplish his extermination from the scene.'

The Tribunal issued the following directions:

'36. In short, the directions that I propose giving to the investigating agency are the following:-

- (i) A more thorough and expert examination of the spot.
- (ii) Preservation of property connected with the crime, already recovered or recoverable from the spot.

- (iii) Expert examination of all the recovered articles together, with a view to narrow down the class of weapon used in the commission of the crime.
 - (iv) Natural witnesses to the occurrence i.e. residents of the area, invitees at the house of Bashir Shah, the Patrol Parties to be subjected to more purposive interrogation particularly for ascertaining the number of shots fired, number of weapons used and the suspects.
 - (v) The surviving occupants of the car should have been profitably interrogated on certain aspects of the investigation.
 - (vi) The material witnesses in the case and the suspects to be fully protected against physical harm.'
- However, nothing was unearthed about the perpetrator(s) of the crime.

5 July 1977

13. The Chief of Army Staff, General Mohammad Zia-ul-Haq, overthrew the democratic order and imposed martial law on 5 July 1977. The investigation of the murder of Mr. Khan on 11 November 1974, which was closed on 3 May 1976, was reopened on the verbal orders of the Director of the Federal Investigation Agency ('FIA').¹⁹ The prosecution never explained how and why an investigation into a thirty-two month old case, which was closed fourteen months earlier, was reopened. It was also not explained how and why the investigation was transferred to the FIA. Both of these actions (the reopening of the investigation and its transfer to FIA) were taken immediately after General Zia-ul-Haq's coup d'etat overthrowing Mr. Bhutto's government. The case was resurrected.²⁰

Post Coup Investigation

14. The interim investigation report (challan) was submitted on 11 September 1977.²¹ In addition to section 302 (murder) of the Pakistan Penal Code, 1860 ('P.P.C.') and section 307 (attempt to murder) mentioned in the FIR were added, sections 120B (criminal conspiracy to commit an offence) and 109 (abetment of an offence). The following seven persons were nominated in the interim investigation report to having conspired to murder Mr. Kasuri and for the murder of Mr. Khan:

- Mr. Bhutto, Prime Minister
- (Sheikh) Masood Mahmood, Director-General FSF
- Mian Muhammad Abbas, Director FSF
- Mr. Ghulam Hussain, Inspector FSF
- Mr. Ghulam Mustafa, Inspector FSF
- Mr. Arshad Iqbal, Sub-Inspector FSF
- (Rana) Iftikhar Ahmad, Assistant Sub-Inspector FSF

However, in the final investigation report (challan) dated 18 September 1977 Masood Mahmood and Mian Muhammad Abbas were shown as approvers.

Transfer of case to the Lahore High Court

15. A murder case under section 302, P.P.C. can only be tried by a Court of Session. Therefore, the investigation report, which was submitted to the Magistrate, was forwarded to the Sessions Judge, Lahore on 12 September 1977. After receipt of the report the trial would have commenced. However, on the very next day (13 September 1977) the case (Criminal Original No.60/77, titled State v. Z. A. Bhutto) came up before Justice Mushtaq Hussain, the Acting Chief Justice ('ACJ'), who the very same day ordered that, 'In view of submissions made in the petition the case is transferred to this Court for trial.' This was done despite the fact that the Sessions Judge, Lahore had already on 12 September 1977 taken cognizance of the case. It is inexplicable how then the case was listed for hearing before the ACJ. Criminal Original No.60/77 is untraceable, therefore, it cannot be ascertained what was recorded therein, and what had necessitated its immediate fixation in the High Court, and before Justice Mushtaq Hussain. The record (which is available), however, shows that Justice Mushtaq Hussain immediately and on the same day 13 September 1977 granted the said petition, by passing the following order:

'In view of the submissions made in the petition the case is transferred to this Court for trial. It shall be heard by a Full Bench consisting of

1. Myself

2. Zakiuddin Pal
3. M.S.H. Qureshi
4. Sheikh Aftab Hussain and
5. Malik Gulbaz Khan, JJ.

To be heard on 24.9.1977.

Maulvi Mushtaq Hussain
ACTING CHIEF JUSTICE'

Commencement of the Trial

16. On 24 September 1977 the trial of Mr. Bhutto and of the other co-accused commenced. The High Court ordered that the evidence be summoned, however, even though the accused were present in Court, the charge was not framed against them. The charge was also not framed on the next date, that is, on 3 October 1977. Framing of charge is a mandatory requirement,²² and only after it is framed can a trial commence. The charge was finally framed on 11 October 1977 when all the accused pleaded not guilty. From 11 October 1977 to 25 February 1978 the High Court (acting as the Trial Court) recorded the statements of forty-one prosecution witnesses (PWs) and of four defence witnesses (DWs). On 2 March 1978 judgment was reserved and it was announced on 18 March 1978. Mr. Bhutto was convicted for the following offences of the PPC: (a) section 120-B and sentenced to five years rigorous imprisonment, (b) section 302 read with sections 301 and 111 and sentenced to death and (c) under section 307 read with section 109 and sentenced to seven years rigorous imprisonment for each offence.

Appeal and Review

17. Mr. Bhutto appealed his conviction before the Supreme Court,²³ but his appeal was dismissed on 6 February 1979 by a majority of four to three.²⁴ A review petition²⁵ seeking review of the Judgment dismissing Mr. Bhutto's criminal appeal was filed, but it was unanimously dismissed on 24 March 1979.

Death Warrant and Execution

18. Mr. Bhutto's 'Warrant of Execution on Sentence of Death' ('the death warrant') was signed by Mushtaq Hussain, J, who by now had become the Chief Justice of the Lahore High Court. The death warrant concluded in the following words: 'Given under my hand and the seal of the Court this 25th day of March 1979', and it directed the Superintendent District Jail at Rawalpindi to execute the sentence on 'the Second day of April 1979'. The execution date was later changed to 'the Fourth day of April 1979'. Mr. Bhutto was executed and the Superintendent District Jail Rawalpindi issued a certificate stating that he was 'hanged by the neck till he was dead at Rawalpindi on Wednesday the 4th day of April, 1979; that the body remained suspended for a full hour and was not taken down until life was ascertained by a medical officer to be extinct...'.

The Constitutional scope of this matter

19. We want to clarify, and emphasize, that we are not hearing a petition, an appeal or a review petition. Neither the Constitution nor the law provides a mechanism whereby Mr. Bhutto's conviction could be set aside. Mr. Bhutto's conviction attained finality after the dismissal of the review petition by the Supreme Court. In our advisory jurisdiction, under Article 186 of the Constitution, the decision cannot be undone.

Detailed Reasons

20. With regard to the conviction and sentence of Mr. Bhutto, on 6 March 2024 we had recorded that, 'in our detailed reasons, we shall identify the major constitutional and legal lapses that had occurred with respect to fair trial and due process'. The following are the detailed reasons.

Reopening of the Investigation

21. The investigation of the murderous attack that took place on 11 November 1974 was undertaken by the Police, however, as no progress could be made it was transferred to the CIA, but still the perpetrator(s) could not be discovered. A Tribunal comprising of a High Court Judge was then constituted who issued certain directions but it did not help in unearthing the criminal(s). The recommendation to close the investigation was then made, which was accepted by the Magistrate and the investigation was officially closed on 3 May 1976. No one objected to the closure of the investigation. No application was submitted to reopen the investigation, and no Court ordered that the investigation be reopened. The complainant, who was a lawyer of some

standing, also did not object to the closure of the investigation nor did he take the objection that its closure was premature.

22. Within a few days of General Zia's take over those, who were made the accused, were arrested, the crime, which was declared to be untraced and the investigation of which had been closed, was reopened (without authorization) and FIA re-investigated it (without authorization). Everyone who was made a co-accused with Mr. Bhutto had surprisingly confessed to the crime. And, the High Court unilaterally and without hearing the accused elected to itself conduct a murder trial, which was wholly unprecedented. Mr. Bhutto had appointed General Zia-ul-Haq as the Army Chief²⁶ who by his actions of 5 July 1977 had clearly violated Article 6 of the Constitution and committed the offence of high treason, the prescribed punishment for which is imprisonment for life or death. General Zia, therefore had a motive to proceed against Mr. Bhutto, because had he not done so, Mr. Bhutto may have proceeded against him for committing high treason.

Reinvestigation by FIA

23. The Federal Investigation Agency Act, 1974 ('the FIA Act') constituted the FIA, and empowered the FIA to investigate the offences listed in the Schedule to the FIA Act, but it does not permit the reinvestigation of a crime which has already been investigated by the Police and the investigation whereof was ordered to be closed. Significantly, no judicial order was issued directing that the investigation be reopened or the crime reinvestigated by the FIA. The FIA had received the case file on 8 August 1977, but it had already commenced reinvestigation on 24 July 1977, as per case diary recorded by Abdul Khaliq, Deputy Director, FIA. This suggests that there was a preconceived objective. This transgression escaped the attention of the Trial Court Judges and also of the majority of the Appellate Court Judges.

Transfer of Case to the High Court

24. The reinvestigation report was submitted to the Sessions Judge, Lahore²⁷ on 12 September 1977 who sought a report from the Public Prosecutor. However, the very next day (on 13 September 1977) the case was placed before a single Judge of the Lahore High Court, namely, Justice Mushtaq Hussain, who did something most unusual. Without issuing notices to Mr. Bhutto and to the other accused, without providing them an opportunity of a hearing and without enabling them to acquire legal representation, he ordered that, 'In view of the submissions made in the petition the case is transferred to this Court for trial.'

25. Section 526 of the Code of Criminal Procedure, 1898 ('the Code') empowers the High Court to transfer a criminal case to itself if: (a) a fair trial is not possible, (b) the case involves some questions of law of unusual difficulty, (c) if the place in or near which any offence has been committed needs to be viewed, (d) it will be to the general convenience of the parties or witnesses or (e) to secure the ends of justice. However, Justice Mushtaq Hussain, ACJ did not cite any reason, let alone any of those mentioned in the law necessitating the transfer of case to the High Court and for it to conduct the trial itself.

Prejudice Caused to the Accused/Convict

26. A murder trial is conducted by a Court of Session.²⁸ Appeal against conviction lies before the High Court.²⁹ Article 185(2)(b) of the Constitution and sections 411-A and 526 of the Code permit trials to be conducted by the High Court, but these provisions do not provide for a High Court to conduct a murder trial. There was not a single precedent of a High Court conducting a murder trial. Mr. Bhutto's murder trial by the High Court made history; never before nor since has this happened. In other countries of the Indian subcontinent, where there are similar legal provisions, a High Court has never conducted a murder trial.

27. By conducting the murder trial itself, the High Court made redundant a number of provisions of the Constitution and Chapter XXVII of the Code. Section 374 requires that every sentence of death is required to be confirmed by the High Court; a vitally important safeguard against faulty convictions and hasty hangings. The sentence of death which is confirmed by the High Court must also be signed by two judges.³⁰ When a sentence of death is passed, the High Court to which the matter is sent for confirmation of the conviction and sentence is also empowered to pass any other sentence warranted by law or acquit the accused person.³¹ In this case the trial was conducted by the High Court as the Trial Court, therefore, the death sentences passed by the Trial Court had to be confirmed by the Appellate Court. The mandatory requirement of section 376 of the Code, reproduced hereunder, was not complied with:

'Power of High Court to confirm sentences or annul conviction: In any case submitted under Section 374 the High Court:

- (a) may confirm the sentence, or pass any other sentence warranted by law; or
- (b) may annul the conviction and convict the accused of any offence of which the Sessions Court might have convicted him or order a new trial on the same or an amended charge; or
- (c) may acquit the accused person;

Provided that no order of confirmation shall be made under this section until the period allowed for preferring an appeal has expired, or, if an appeal is presented within such period, until such appeal is disposed of.'

28. If for argument's sake it be accepted that the High Court could have conducted a murder trial, this it then did as a Trial Court, and as death sentences were passed these had to be confirmed by submitting the case to the High Court. Any two Judges of the High Court, who had not conducted the trial, could have done so in terms of section 376 of the Code. But, this was not done. Without confirming the sentences of death they could not have been executed. The Code, and its section 376, which provides essential protection to those sentenced to death, was enacted in 1898, but this provision has only once been disregarded, which was in this case.

Constitutional Safeguards were Disregarded

29. The Constitution mandates that, 'To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen.'³² And, 'In particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law.'³³ The law (section 376 of the Code) requiring the confirmation of death sentences was violated and this inalienable right was contravened. Article 9 of the Constitution stipulates that, 'No person shall be deprived of life or liberty save in accordance with law,' and this fundamental right too was violated, regrettably, by those mandated to ensure the laws compliance.

Right of appeal lost

30. An appeal against the conviction and sentence of a Court of Session lies to the High Court.³⁴ However, since the trial was conducted by the High Court itself, Mr. Bhutto and the other accused were deprived of one right of appeal. Article 4(1) of the Constitution which requires that all be treated in accordance with law, and Article 9 of the Constitution which prohibits anyone to be deprived of life save in accordance with law were vitiated. The convicts were deprived of one right of appeal, which Articles 4(1) and 9 guaranteed, and these rights can not be undone or disregarded, even during the proclamation of emergency.³⁵

Right to Fair Trial and Due Process

31. The right to due process and a fair trial is part of the jurisprudence of Pakistan. These rights subsisted even before 'the right to fair trial and due process' were specifically incorporated in the Constitution, through Article 10A in the year 2010 as Fundamental Rights.³⁶ In the case of *Abul A'la Moudoodi v. Government of West Pakistan*³⁷ a five-Member Bench of the Supreme Court had stated (in 1964) that the necessity of due process 'is an element of justice which forms part of the British Common Law', that is inherited by Pakistan. In the case of *Benazir Bhutto v. Federation of Pakistan*³⁸ (1988) the Fundamental Right to life (Article 9 of the Constitution) was held, by an eleven-Member Bench of the Supreme Court, to include access to justice, which incorporates fair trial and due process:

'The right of "access to justice to all" is a well-recognised inviolable right enshrined in Article 9 of the Constitution. This right is equally found in the doctrine of "due process of law". The right of access to justice includes the right to be treated according to law, the right to have a fair and proper trial and a right to have an impartial Court or Tribunal. This conclusion finds support from the observation of Willoughby in *Constitution of United States, Second Edition, Vol. II* at page 1709 where the term "due process of law" has been summarised as follows:

- "(1) He shall have due notice of proceedings which affect his rights.
- (2) He shall be given reasonable opportunity to defend.

- (3) That the Tribunal or Court before which his rights are adjudicated is so constituted as to give reasonable assurance of his honesty and impartiality, and
- (4) That it is a Court of competent jurisdiction."

It therefore follows that in terms of Article 9 of the Constitution a person is entitled to have an impartial Court and tribunal. Unless an impartial and independent Court is established the right to have a fair trial according to law cannot be achieved.'

The above principle was reiterated (in 1993) in the case of *Government of Balochistan v. Azizullah Memon*:³⁹

'The right of access to justice is internationally well-recognised human right and is now being implemented and executed by granting relief under the Constitutional provisions. Article 10 of Universal Declaration of Human Rights and Article 14 of the United Nations Convention on Criminal Political Rights⁴⁰ recognize the right of fair trial by an independent and impartial Tribunal established by law.'

'The right of access to justice does not only mean that the law may provide remedies for the violation of rights, but it also means that every citizen should have equal opportunity and right to approach the Courts without any discrimination. It also envisages that normally the Courts established by law shall be open for all citizens alike. Where the jurisdiction of the ordinary Courts established under the ordinary law is excluded or barred and certain class of cases or class of persons or inhabitants of an area are not allowed to approach such Courts and are to be tried or rights adjudicated by special Courts, then a fair, rational and reasonable classification must be made which have nexus with the object of the legislation.'

*Al-Jehad Trust v. Federation of Pakistan*⁴¹ was decided by a five-Member Bench (in 1996) and it reiterated the earlier (1994) decision in the case of *Government of Sindh v. Sharaf Faridi*,⁴² in which the due process of law requirement had been stressed.⁴³

In the above mentioned cases, and in many others recording similar opinions, the jurisprudence of fair trial and due process stood established as a fundamental right well before the insertion of Article 10A⁴⁴ in the Constitution in 2010. The safeguards to ensure that an accused is fairly and justly treated and that essential requirements of a fair trial and due process are met were disregarded in the case of Mr. Bhutto.

Basis of Conviction

32. The foremost basis for the conviction of Mr. Bhutto was the testimony of an accused, who turned approver, namely, (Sheikh) Masood Mahmood, the then Director-General of the Federal Security Force ('FSF'). After the coup d'etat of 5 July 1977 Masood Mahmood was arrested, nominated as an accused and pleaded that he would make disclosure of the crime, provided he is pardoned. His plea was accepted and he was made an approver.⁴⁵

Masood Mahmood the Approver

33. After Masood Mahmood's arrest he wrote to the District Magistrate, Lahore on 7 September 1977, stating he had, 'simply carried out orders of the former Prime Minister of Pakistan, Mr. Zulfikar Ali Bhutto, to cause the death of Mr. Ahmad Raza Kasuri.' And, 'in case I am granted pardon... I would be able to disclose material facts regarding the conspiracy leading to the murder...'. He did so because, to use his own words, 'the commission of this heinous crime has haunted my conscience.' Incarceration had revived his flagging conscience. The crime was committed three years earlier and Masood Mahmood's conscience remained dormant and only awoke when he was arrested. A conscience which first wanted to secure a pardon for himself. A conscience which considered that to order an assassination was 'simply' a matter of 'carrying out orders', as was stated by this most senior police officer. The Additional District Magistrate accepted Masood Mahmood's plea on 14 September 1977, seven days after he had written to him offering 'to disclose material facts.'

Statement of Masood Mahmood

34. Masood Mahmood was made an approver on 14 September 1977, and his statement was recorded the same day. He waxed eloquent and most of what he said was irrelevant. The first four pages mention the various positions that he had held and how he reached grade 21. 'My selection to the Indian Police was made against a war reserved vacancy as I had served briefly in the Royal Indian Air Force.' And, 'I resumed duty on 18th September 1948 as Assistant Superintendent Police.' This was followed by saying that Prime Minister

Mr. Bhutto had sent for him on 12 April 1974, had praised him and noted the 'good work' he had done and acknowledged his 'established reputation for integrity, honesty and hard work.' It is questionable whether integrity and honesty would be the qualities to look for in a henchman. Masood Mahmood stated that after an hour of Mr. Bhutto persuading him he condescended to 'take-over as D.G. (FSF) to re-organise and train the force.' He then proceeded to reveal his vulnerability, stating that his ex-colleague Saeed Ahmad Khan, Chief Security Officer of the Prime Minister, and his Assistant, Abdul Hamid Bajwa, told him that if he did not do as Mr. Bhutto asked, 'your wife and children may see no more of you.' Saeed Ahmed Khan was not produced as a witness and Abdul Hamid Bajwa had died, therefore, anything allegedly said by them constituted hearsay. Masood Mahmood then disclosed his cowardice, stating that Mr. Bhutto had told him, 'You do not want Waqar chasing you ... ?' Waqar was also not produced as a witness. Another name which Masood Mahmood dropped was of M. R. Welch, Director FSF in Quetta, who he 'instructed to take care of him [Mr. Kasuri] if possible in Quetta'. Masood Mahmood stated 'that Mian Abbas had previously been asked under his orders through Mr. Haq Nawaz Tiwana do away with Ahmad Raza Kasuri. He directed me to tell Mian Abbas to get on with the job and tell Mian Abbas to produce either Ahmad Raza Kasuri's dead-body or his body totally bandaged all over.' Mian Muhammad Abbas, however, retracted his statement before the Trial Court and Haq Nawaz Tiwana, the previous Director-General of FSF, was not produced to testify. Masood Mahmood stated that Mr. Bhutto had wanted Mr. Kasuri to be killed for quite some time and had already directed Mian Abbas to do so, but to no effect. However, only when Masood Mahmood directed him to do so was Mr. Kasuri fired upon, which instead killed Mr. Khan.

Masood Mahmood Defiance of the Prohibition to Kill

35. Masood Mahmood put himself forward as a man having faith () in God and knew that ordering someone's murder was 'against the dictates of God', but since he was given 'specific orders' from Mr. Bhutto he became 'instrumental in defying God Almighty (May He forgive me) for taking a valuable human life.' The reason cited by Masood Mahmood for defying God was his marital status - 'I would have chucked the job and walked down on the street, had I been a bachelor.'

Masood Mahmood's Credibility

36. Masood Mahmood's credibility was accepted and he was believed without demur by the Trial and Appellate Courts. However, there were a number of factors which prudence should have alerted and shown that he was self-serving, self-preserving, morally bankrupt, and a false witness:

- (1) Masood Mahmood testified that Mr. Bhutto had appointed him as the Director General of FSF because of his integrity and honesty, but would those be the qualities that would be sought in one appointed to fulfill a criminal agenda and carry out nefarious activities.
- (2) Masood Mahmood stated that 'his father and the deceased were great friends' yet he had no qualms to order the assassination of the son of his father's great friend.
- (3) Mr. Bhutto had already instructed Mian Muhammad Abbas to assassinate Mr. Kasuri, according to Masood Mahmood, therefore, it is inexplicable why he would then also tell Masood Mahmood to do so.
- (4) Masood Mahmood stated that Mian Muhammad Abbas did not follow Mr. Bhutto's directions to kill Mr. Kasuri, but offered no explanation why he disobeyed and suffered no consequences for such disobedience.
- (5) However, Masood Mahmood's orders were followed by Mian Muhammad Abbas, who had earlier disobeyed the Prime Minister.
- (6) As stated by Masood Mahmood it was acceptable to Mr. Bhutto if Mr. Kasuri was given a thorough beating yet he directed that Mr. Kasuri be killed.
- (7) In ordering an assassination, and not a beating, Masood Mahmood alone would be responsible for it.
- (8) Masood Mahmood stated that the following were complicit and were informed about the conspiracy to kill Mr. Kasuri: (1) Haq Nawaz Tiwana, the first Director-General of FSF, (2) Mian Muhammad Abbas, Director FSF, (3) M. R. Welch, Director FSF, Quetta, (4) Saeed Ahmed Khan, Prime Minister's Chief Security Officer, (5) Abdul Hamid Bajwa, Assistant Chief Security Officer and (6) himself. This number of persons knowing about a heinous conspiracy showed complete recklessness and disregard of detection, which any reasonable person would find hard to accept.

(9) The conspiracy theory put forward by Masood Mahmood was believed without a shred of supporting evidence.

(10) After Mr. Khan's murder Masood Mahmood continued to hold the position of DG of FSF, however, he was never again asked by Mr. Bhutto to do anything nefarious, let alone to kill. Did this mean that Mr. Bhutto had only one enemy, and the FSF comprising of thousands of personnel, was established for this sole purpose.

(11) Masood Mahmood secured his freedom and a passage out of the country by sacrificing Mr. Bhutto. A prudent person would be alerted to the conduct of such a person, yet Masood Mahmood's credibility was not questioned by those whose judicial duty it was to satisfy themselves of it.

Conscience and Convenience

37. Masood Mahmood repeatedly referred to his conscience. 'My conscience haunted me' and 'that this action [murder] would be against my conscience.' However, his conscience, lay dormant throughout his tenure as the Director-General of the FSF; it surfaced when he had spent only a few days in custody, and, his resurgent conscience was premised on first extricating himself and securing for himself a pardon. His convenience and safety trumped his conscience, which begs the question, was he truthful or an opportunist? Confessions must be voluntary and must not have 'been obtained from him by fear of prejudice or hope or advantage'.⁴⁶ And, 'If the confession directly or indirectly is the result of inducement, threat or promise from a person in authority, it would be treated as not voluntary'.⁴⁷ It must be 'ensure[d] that the confessional statement should be absolutely free from the slightest tinge or taint of extraneous influence such as threat, promise or inducement and the Courts are placed under an obligation to affirmatively satisfy themselves that it is free and voluntary'.⁴⁸ Masood Mahmood obtained for himself freedom from captivity by his self-serving statement. Masood Mahmood melodramatically put forward his faith by overlooking Islam's most fundamental teaching, and prohibition: to kill a human, and that killing one person was like the killing of all of humanity and saving one person was like the saving of all of humanity.⁴⁹ This type of person the Federal Court had perceptively categorized as 'a moral wretch'.⁵⁰

Lack of Evidence

38. With regard to the three offences attracting death sentences, section 302 (murder), section 307 (attempted murder) and section 111 (abetment), there was no direct evidence against Mr. Bhutto, there wasn't even circumstantial evidence, which would exclude any reasonable hypothesis of innocence. The entire prosecution case was built on the statements of Masood Mahmood and Mian Muhammad Abbas, however, Mian Muhammad Abbas retracted his confession and testified to the contrary. Haq Nawaz Tiwana and Abdul Hamid Bajwa had died. M. R. Welch and Saeed Ahmed Khan, without being made approvers, were produced as prosecution witnesses.

Negative Forensic Report

39. The spent bullet casings, ejected from the firearm(s) that were used in the attack, did not match any of the weapons in use of the FSF. The prosecution contended that they were substituted, but without producing any positive evidence to substantiate this. Nonetheless, this contention of the prosecution was accepted, and it was further presumed that the purported substitution was done at the behest of Mr. Bhutto.

Unsubstantiated Inferences

40. Certain notings in some file/document, statedly made by Abdul Ahad, DSP, and Abdul Hamid Bajwa (exhibits 3/2-A and 3/2-A/ 1), were brought on record. And, Mr. Bhutto was sought to be implicated by relying on them purely on the basis of assumptions and his 'subsequent conduct', without stating what this was and how it incriminated him. The Trial Court held that, 'These documents corroborate the evidence of these witnesses on this point,' but without stating the said point. The judgment follows this with another vague sentence - 'These documents further show that the principal accused as well as P. W. 3 agreed to this suggestion', without expounding on what was this suggestion and to what had they agreed. Neither Abdul Ahad nor Abdul Hamid Bajwa were produced as witnesses (Abdul Hamid Bajwa had died), therefore, they could not be subjected to cross-examination. Extraordinary effort was made to draw arbitrary connections, derive meanings therefrom

and then use them against the accused. This eroded the fundamental principle of establishing guilt beyond reasonable doubt. The manner in which the trial was conducted was antithetical to a fair trial and due process.

Motive - Corroboration

41. Section 114 of the Evidence Act, 1872⁵¹ in its illustration (b) states, 'that an accomplice is unworthy of credit, unless he is corroborated in material particulars.' In criminal jurisprudence it is well settled that motive cannot corroborate an approver's testimony.⁵² However, the Trial Court was of the opinion that motive could be used as corroboration as expressed in paragraph 584 of its judgment, comprising of 627 paragraphs.

Respectfully, it was also incorrect to say that, 'The principle laid down is not so wide', which was in complete negation of the said statutory provision. Only in paragraph 584 of the judgment was there a fleeting reference to motive yet the Trial Court proceeded on an incorrect assumption that the motive stood established, even though the facts did not suggest this.

42. The Appellate Court's majority judgment,⁵³ which comprised of 963 paragraphs, probably the longest judgment in any criminal case, upheld the High Court's judgment. The majority of the Judges of the Appellate Court took an even more novel approach, by first holding that the four co-accused and two approvers were not accomplices but witnesses, and then holding (on this entirely incorrect assumption) that they did not require corroboration. Corroboration of accomplices was categorized as an artificial requirement. 'Without introducing an artificial requirement of corroboration of his evidence by applying the rule contained in illustration (b) to section 114 of the Evidence Act.' Disregarding a statutory provision and declaring it to be an artificial requirement did not behove judges, and all the more so when the object of the law is to prevent wrong convictions.

The Asserted Motive - Constitutional Protection

43. The motive cited by Mr. Kasuri for targeting him was his political differences with Mr. Bhutto. Mr. Kasuri cited Mr. Bhutto's speech of 3 June 1974 in the National Assembly and the exchange of words between them as the motive for the crime. Other speeches in the National Assembly were also referred to, and relied upon, to support motive. The proceedings of the National Assembly were also relied upon by the Courts. This was not permissible. The Constitution stipulates that, 'no member shall be liable to any proceedings in any court in respect of anything said'⁵⁴ in Parliament. This constitutional provision, and protection accorded to the Members of Parliament, was not even considered.

44. Mr. Kasuri stated that he was an opponent of Mr. Bhutto yet whatever he said was believed. The possibility of others having a motive, which were mentioned in Report of the Tribunal was not explored. Mr. Khan was shot at and died; the investigators also did not consider the possibility that Mr. Khan may have been the intended target. There were also two ladies in the ill-fated car but, surprisingly, neither of them, nor any of the other children of Mr. Khan were examined to consider whether someone else may have had a motive. Mr. Bhutto's enmity with Mr. Kasuri was cited by Mr. Kasuri as the motive, however, it was not even considered that such enmity could equally be a reason to falsely implicate Mr. Bhutto.

Did Mr. Bhutto or Mr. Kasuri have Motive?

45. The entire prosecution case was premised on the motive which Mr. Kasuri asserted. However, this at best was an expression of suspicion; he could not say that he had personal knowledge of any specific conspiracy on Mr. Bhutto's part. When Mr. Kasuri testified in Court he undermined his own credibility, and consequently the suspicion he harboured that Mr. Bhutto was behind the attack. Mr. Kasuri had successfully contested on the Pakistan Peoples Party ('PPP') ticket from Kasur (NA 63) in the general elections held in 1970. He stated that Mr. Bhutto had 'suspended my primary membership of PPP' on 2 May 1971. And the very next day, 'On 3.5.1971, in a Press Conference I floated my own group in the PPP, which was known all over the country as PPP (Raza Progressive Group).' Mr. Kasuri stated that he then 'made a temporary peace with Mr. Bhutto as a matter of political strategy... in the year 1972.' But, 'Immediately after the lifting of the Martial Law on 21st April, 1972, I showed my teeth against Mr. Bhutto and revived my old role of criticising him both outside and inside the National Assembly of Pakistan.' He continued, 'Mr. Bhutto formally expelled me from the PPP in October, 1972. In June, 1973 I joined Tehrik-I-Istiqlal and I rejoined PPP on 6th April 1976. I joined the PPP

because of instinct of self-preservation, because I knew I was a marked man.' The inconsistencies in Mr. Kasuri's testimony abound.

46. Mr. Kasuri attributed the killing of his father to Mr. Bhutto but had no qualms applying to him for a PPP ticket to contest the 1977 general elections - 'I did apply for a PPP ticket for election to the National Assembly this year, ... The ticket was not awarded.' Surely, self-preservation could not be a reason for applying for a PPP ticket in the coming elections. Mr. Kasuri was confronted in cross-examination with his letter (P.W. 1/19) through which he had requested for an interview with Mr. Bhutto, and he stated, 'This request for seeking an interview pertains to the period from 8th of January to 30th of January, 1977, because in this period the tickets had to be decided and I was seeking an interview in relation to that.'

Motive Vitiated by Mr. Kasuri

47. Mr. Kasuri undermined his own narrative and credibility. He rejoined the PPP, headed by Mr. Bhutto, who he had earlier accused for the murderous attack on him, but which had killed his father. Mr. Kasuri tried to resolve this contradiction by saying that he did so for self-preservation. This explanation is difficult to accept, because it would mean that when his father was killed in 1974 he had acted bravely and nominated the Prime Minister for conspiracy and murder but later cowardice awashed over him. It is inexplicable why he would solicit the PPP ticket from the nominated accused after the murder of his father. The justification he offered was irreconcilable and unbelievable. It was imperative for the Trial Court to have scrutinized Mr. Kasuri's vacillating explanations and for the Appellate Court to have analyzed his recorded testimony in this regard, but unfortunately this was not done. The entire prosecution case was premised on Mr. Bhutto having the motive to have Mr. Kasuri killed. A motive which Mr. Kasuri himself vitiated.

48. The Trial Court and the Appellate Court gave credence to the motive theory, however, Mr. Kasuri's testimony could be equally treated to be that of a person wanting to settle personal scores. His testimony had created more than reasonable doubt about the alleged motive and it was equally suggestive of his animus towards Mr. Bhutto and to falsely implicate him. The prosecution is required to establish the guilt of an accused beyond reasonable doubt, which in the case of Mr. Bhutto with regard to motive, the attendant conspiracy and resultant killing it had not done.

Failure to Establish Motive

49. The matter of motive in this case, unlike other criminal cases, was very significant also because of the charge of conspiracy. It is also well established that in criminal cases the prosecution need not set up a motive but if it elects to do so and then fails to establish it the prosecution suffers its consequences.⁵⁵ The motive's absence, or failure to establish it is also consequential in a murder case in which the guilt of the offender is established but the asserted motive is not. In such cases the accused invariably is not given capital punishment, but instead imprisonment for life.⁵⁶

Either Kill or Beat Mr. Kasuri

50. Masood Mahmood had confessed, and testified in Court, that Mr. Bhutto wanted one of two outcomes; either that Mr. Kasuri is killed or that he be severely beaten up. In his confessional statement⁵⁷ Masood Mahmood said, 'He [Mr. Bhutto] then ordered me to tell Mian Abbas to get on with it and produce either Ahmed Raza Kasuri dead body or his body totally bandaged all over...'. And, that, 'After giving orders to Mian Abbas I carried on normal work....' In his testimony (recorded before the five-Member Trial Court) he said, 'The Prime Minister went on to instruct me that I should ask Mian Muhammad Abbas to get on with the job and to produce the dead body of Mr. Ahmed Raza Kasuri or his body bandaged all over.' And, 'I repeated to [Mian Muhammad Abbas] him the orders of the then Prime Minister verbatim.' He did not disclose the orders that he gave to Mian Abbas. Masood Mahmood (in following Mr. Bhutto's stated orders) could have elected to direct that Mr. Kasuri be given a severe beating, however, he presumably elected to order that he be killed. This aspect neither the Trial Court nor the Appellate Court considered. Therefore, Masood Mahmood, and not Mr. Bhutto, would be liable for the killing.

First Information Report - FIR

51. The crime was first reported to the police, not by Mr. Kasuri, but by his brother, as Mr. Kasuri himself stated. 'My brother, Maj. Ali Raza rang up S. S.P. [Senior Superintendent of Police] Lahore and told him

about this incident on the telephone. S. S.P., Lahore at that time was Mr. Asghar Khan, who after, receiving this message on the telephone arrived in the hospital ... along with others. A large contingent of Police also arrived on various kinds of vehicles.' S.S.P. Lahore (PW 12) also confirmed that the crime was first reported by 'Major Ali Raza son of Nawab Muhammad Khan Kasuri, after midnight.' Major Ali Raza, who first informed the police, was also in the hospital when the police reached it. However, the FIR did not mention Major Ali Raza as the informant and the FIR's complainant.

52. Mr. Kasuri submitted a written complaint after almost three hours had elapsed since the crime, in which he mentioned Mr. Bhutto. The FIR was registered at 3.45 am on 11 November 1974 which showed Mr. Kasuri (and not his brother) as the informant/ complainant.

53. Section 154 of the Code requires that when information of a cognizable offence is given to the police it is required to be recorded by the officer in charge of the concerned police station. The categorization of reporting of a crime and reducing it into writing as the first information report (FIR), as its name suggests, is the very first information of a cognizable crime received by the police. An important object of the FIR, which courts consider, is that the crime was promptly reported to the police without retrospection and embellishment.

54. The first reporting of the crime to the police was by Major Ali Raza, however, the FIR was not registered when he reported the crime, nor was he cited as the informant/complainant in the FIR when it was registered. Surprisingly, Major Ali Raza was also not produced as a witness. This glaring anomaly went unnoticed by the Trial Court as well as by the majority of the Appellate Court. On its own this may be inconsequential but since the courts had categorized Mr. Kasuri as the informant, had assumed that the FIR was promptly recorded, without Mr. Kasuri having had time to embellish it and to falsely implicate Mr. Bhutto, and the prosecution had alleged that there was a conspiracy by basing it on the contents of the FIR, all of which the courts had unquestioningly accepted, it became most significant. This was yet another aspect showing that the law and the constitutional safeguards to ensure a fair trial had been disregarded.

The Co-accused

55. All the six co-accused were arrested after General Zia's takeover and the imposition of Martial Law, and all of them had confessed to the crime. This remarkable coincidence neither the Trial Court nor the Appellate Court considered to be unusual nor was it ever considered whether these confessions could have been induced. Two of the accused were pardoned and made approvers. One retracted his confession before the Trial Court but reiterated it before the Appellate Court. The remaining three co-accused did not even engage a counsel and the Trial Court appointed a counsel (at State expense) to represent all three of them, however, their counsel⁵⁸ at every juncture wanted to implicate, rather than extricate, his clients and was at pains to reinforce the prosecution case to prove Mr. Bhutto's guilt and thus of his own clients. It was the duty of the counsel, and of the Trial Court, to explain to these three co-accused that to abide by the command of a superior is not a defence to the charge of murder, but this was not done.

Supreme Court Bench Reconstituted

56. Nine Judges commenced hearing the appeal filed by Mr. Bhutto,⁵⁹ and heard it till 30 July 1978, whereafter seven Judges heard it on 21 August 1978 and they announced their judgment on 6 February 1979. One of the nine Judges was Qaiser Khan, J who had retired on 30 July 1978, on his sixty-fifth birthday.⁶⁰ The Constitution envisages that an ad hoc Judge may be appointed within three years of his retirement,⁶¹ but he was not appointed, despite having heard the appeal; the appellant's request in this regard was not heeded. Another Judge, Waheeduddin Ahmed, J, fell ill when the appeal was in its final stages of hearing and required about six weeks to recuperate, but rather than adjourning the case and awaiting for him to resume work the appeal was heard and was concluded in his absence. Considering that the appellant had been convicted and was incarcerated it is not understandable why Qaiser Khan, J was not appointed as an adhoc Judge after his retirement nor why the Appellate Court could not wait for Waheeduddin Ahmed, J to rejoin the Bench. This may have been inconsequential if the Appellate Court's decision was unanimous, but when four Judges had upheld the conviction and three had acquitted Mr. Bhutto it was a matter of great concern.

President's Power to Grant Pardon

57. Fazal Ellahi Chaudhry was elected as the first President of Pakistan under the new Constitution.⁶² General Zia-ul-Haq took over the office of President on 16 September 1978, without being elected to it. The Constitution grants to the President the power to pardon, remit, suspend or commute any sentence passed by any court.⁶³ President Fazal Ellahi Chaudhry had (on his own volition) written to General Zia-ul-Haq 'spelling out extrajudicial considerations which would weigh with the Executive in taking a decision in this matter.'⁶⁴ However, the High Court took inexplicable umbrage with Mr. Bhutto's counsel referring to this letter. 'In these circumstances, the introduction of this letter in the present proceedings is nothing but an attempt to politicise the matter... We deprecate such an attempt.'⁶⁵ What, however, is of significance is that Mr. Bhutto was not dealt with in accordance with Article 45 of the Constitution, despite the reasons mentioned by President Fazal Ellahi Chaudhry in his letter. This was yet another transgression of due process, and to enjoy the protection of law and to be treated in accordance with law.⁶⁶

Judges who Headed the Benches

58. Justice Mushtaq Hussain, in his capacity as the Acting Chief Justice, headed the Bench of the Lahore High Court which had convicted Mr. Bhutto, and Justice Anwarul Haq was the Chief Justice of the Supreme Court and headed the Bench which had upheld the conviction. The assumption of offices by both these Judges was somewhat unusual.

(a) Lahore High Court: Justice Mushtaq Hussain was appointed as the Acting Chief Justice of the Lahore High Court on 13 July 1977, when Justice Aslam Riaz Hussain was holding the position of the Chief Justice of the Lahore High Court. However, Chief Justice Aslam Riaz Hussain was appointed as the Acting Governor of Punjab, and had relinquished the position of the Chief Justice of the Lahore High Court on 16 July 1977, and on the same day administered oath to Justice Mushtaq Hussain as the Acting Chief Justice of the Lahore High Court. The Chief Justice of the Lahore High Court became the Acting Governor of Punjab, who gave oath to an Acting Chief Justice who continued in his acting position for six months; he was given oath as Chief Justice on 16 January 1978. The Constitution does not permit the constitutional office of the Chief Justice to be kept vacant for such a long duration. A High Court consists of a Chief Justice and Judges⁶⁷ and an Acting Chief Justice is appointed temporarily and only under certain circumstances.⁶⁸ An Acting Chief Justice, who later was made the Chief Justice, had transferred a murder case to the High Court and had himself presided over the trial, which under the aforesaid circumstances gave rise to justifiable misgivings.

(b) Supreme Court: Justice Muhammad Yaqub Ali was the Chief Justice of Pakistan who, 'relinquished charge of the office of Chief Justice of Pakistan' on 22 September 1977. A Judge retires or may resign.⁶⁹ Relinquishment of charge is alien to the Constitution. General Zia-ul-Haq, promulgated Martial Law Order 6 of 1977⁷⁰ which compelled Justice Muhammad Yaqub Ali to relinquish the office of Chief Justice of Pakistan and enabled the appointment of another. Consequently, Justice Anwarul Haq was appointed as the Chief Justice of Pakistan on 23 September 1977, 'In pursuance of the Proclamation of the fifth day of July, 1977, read with the Laws (Continuance in Force) Order, 1977 (C.M.L.A Order No. 1 of 1977), and in exercise of all powers enabling him in that behalf' The General who had overthrown the democratic order, cast aside the Constitution, pushed aside the Chief Justice of Pakistan and appointed another in his place, one who presided over the Bench which had heard Mr. Bhutto's appeal. And, crucially, Prime Minister Mr. Bhutto was deposed by General Zia-ul-Haq, who had appointed himself as the President of Pakistan by issuing President's Succession Order 1978.⁷¹ These are the facts, historical irony notwithstanding.

Bias of Justice Mushtaq Hussain

59. Mr. Bhutto had repeatedly claimed that Justice Mushtaq Hussain, who was the Acting Chief Justice (later Chief Justice) of the Lahore High Court, was prejudiced against him and was motivated by bias, and that he should not conduct the trial, let alone head the Bench conducting the trial, but this objection was cast aside by the Court.

60. The mere allegation or apprehension of prejudice or bias is not sufficient to sustain it. There must be something tangible and credible which exhibits bias. However, where there is bias it corrodes impartiality, and impartiality is necessary for correct decision-making and also to engender the acceptance of decisions. 'It

is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.⁷²

61. Martial law was imposed on 5 July 1977 and Mr. Bhutto was arrested on 3 September 1977, in a three year old criminal case which had been closed as untraced. Despite having been granted bail by the High Court Mr. Bhutto was arrested on 16 September 1977 under Martial Law Order No. 12.⁷³ Mr. Bhutto had obtained bail on 13 September 1977 on the very same day (13 September 1977) Justice Mushtaq Hussain constituted a Bench headed by himself to try Mr. Bhutto and also himself heard the petition seeking cancellation of his bail.

62. The five-Member Bench constituted by Justice Mushtaq Hussain issued a show cause notice on 21 September 1977 to Mr. Bhutto, and gave him all of two days to state why the bail granted to him by the High Court should not be cancelled. The show cause notice also paradoxically directed him to appear before the five-Member Bench on 24 September 1977 despite the fact that Mr. Bhutto was incarcerated. On 21 September 1977 Mr. Bhutto challenged the transfer of the case to the High Court by Justice Mushtaq Hussain and placing it before a Bench which he headed.

63. Mr. Bhutto submitted a petition before the Supreme Court stating that Justice Mushtaq Hussain was prejudicial towards him and also had a bias against him. On 24 September 1977 the Supreme Court dismissed the application stating that the same should first be filed before the Trial Court.

64. Mr. Bhutto, pursuant to the Supreme Court order, filed applications seeking Justice Mushtaq Hussain's recusal on a number of grounds, including that: (1) Justice Mushtaq Hussain 'was prejudiced and partial against the Pakistan Peoples Party' and in this regard his statements (published in newspapers) were referred to. (2) The application seeking cancellation of bail, which was granted on 13 September 1977 by K.M.A. Samdani, J of the High Court, was placed before a five-Member Trial Court, constituted by Justice Mushtaq Hussain, and bail was cancelled on 8 October 1977, which could not be done by the Trial Court (because bail had been granted by the High Court), and that too without giving sufficient notice. (3) Upon acceptance of the office of Chief Election Commissioner Justice Mushtaq Hussain ceased to be Acting Chief Justice/Chief Justice because the Constitution stipulated that the Chief Election Commissioner could not hold another office.⁷⁴ (4) Specific instances of prejudicial conduct and bias during the conduct of the case were also mentioned. (5) The transfer of the trial from the Court of Session to the High Court, without notice to the accused, further confirmed the prejudice and the bias of Justice Mushtaq Hussain. (6) Private complaint case, on the same facts, was fixed for hearing before a Bench of the High Court,⁷⁵ however, Justice Mushtaq Hussain got it placed before the Bench he constituted and headed. (7) And, that Justice Mushtaq Hussain had not taken the oath prescribed under the Constitution but one crafted by the Chief Martial Law Administrator, therefore, he could not be considered to be the Acting Chief Justice or the Chief Justice of the Lahore High Court under the Constitution.

Bias of Trial Court

65. The five-Member Trial Court Bench unanimously dismissed the applications⁷⁶ filed by Mr. Bhutto. Request for recusal of a Judge is to be attended by the Judge whose recusal is sought. However, the Bench gave detailed findings on the objections which had been raised by Mr. Bhutto with regard to Justice Mushtaq Hussain. Justice Aftab Hussain⁷⁷ wrote the order through which Mr. Bhutto's applications (seeking recusal) were dismissed. Justice Mushtaq Hussain simply wrote two words - 'I agree' - on the order. The Hon'ble Judges signing this order justified taking oath under Martial Law⁷⁸ (and not under the Constitution) because if they did not do so 'it will lead to the result that there is no superior Court in Pakistan.' The expression of such nihilism was wholly unjustified, and unnecessary when attending to a request for the recusal of a Judge. The Judges forgot that 'Obedience to the Constitution' was their 'basic obligation', like it is of every person in Pakistan.⁷⁹ And, that they had also taken the oath to 'preserve, protect and defend the Constitution.'⁸⁰ Such anomie expressed by the Judges undermined the Constitution, and the necessity to abide by it. The order had a devastating effect on citizens and the body politic. Inculcating acceptance of autocratic rule and making it difficult to shake off the yolk of servitude.

66. The order dated 9 October 1977 also gave a definite finding with regard to Justice Mushtaq Hussain simultaneously holding the offices of Acting Chief Justice and of the Chief Election Commissioner by

staggeringly extraordinary reasoning - 'The Acting Chief Justice cannot be said to have been appointed as Chief Election Commissioner under the Constitution. His appointment is regulated by Election Commission of Order, 1977 (President's Post Proclamation Order 4 of 1977).' The applicable constitutional provisions with regard to the Chief Election Commissioner⁸¹ were disregarded in preference to the proclamation of one man, who had assumed power unconstitutionally. Incongruity mocked when the Chief Election Commissioner could not even ensure that the stated 'forthcoming General Elections' were held, for which he was chosen and given the office of the Chief Election Commissioner. Scorching irony replaced unconvincing reasoning.

67. With regard to Justice Mushtaq Hussain's transfer of the trial from the Court of Session to the High Court, without issuing notice to Mr. Bhutto, the order disregarded the age old wisdom that a party is entitled to an opportunity of a hearing.⁸² It held that, 'No such notice was required in the present case.' This flagrantly disregarded the due process principle which is firmly embedded in our jurisprudence.

68. Mr. Bhutto's objection to the assumption of jurisdiction by the five-Member Bench and also that of the complaint case (filed by Mr. Kasuri) after it was listed for hearing before 'a Division Bench consisting of K.M.A. Samdani, J and Mazharul Haq, J' was brushed aside by expressing surprise. 'It looks rather strange that the accused petitioner should prefer to be tried by a Bench of two Judges and not a larger Bench of five Judges bound by their oath of office to impart justice without fear or favour.' The learned Judges of the Trial Court referred to their oath, but forgot that they had also taken one under General Zia-ul-Haq's dispensation. In any event the two Judges of the Division Bench were as bound by their oath of office to impart justice as were the five. Stressing that they were bound by their oath and to state that the 'constitution of such a Bench [of five Judges] should inspire more confidence rather than create any apprehension in the mind of any party' was quite unnecessary.⁸³ In any event, and with hindsight, the apprehension of Mr. Bhutto proved to be correct.

69. In Justice Mushtaq Hussain transferring the trial to the High Court, taking away the pending complaint case from the Division Bench of the High Court and fixing it before the Trial Court, which he himself headed, was extraordinary. The law was not followed and settled methodology departed from.

70. Bias was on display in a number of paragraphs of the Trial Court judgment. Gratis observations were made which had absolutely nothing to do with the case before the Court, which was, whether Mr. Bhutto had conspired to order the assassination of Mr. Kasuri. Extraneous paragraphs were written to dishonour and disgrace Mr. Bhutto by five Hon'ble Judges who deemed it necessary to state that, before Mr. Bhutto sought 'election to the office of the Chief Executive of the Federation he would order his own life in accordance with the injunctions and teachings of Holy Qur'an and Sunnah.' The priggish sanctimony, with respect, did not stop here. The moralizing continued:

'Before undertaking to observe the principles of democracy, freedom, equality, tolerance and social justice, as enunciated by Islam he should inculcate these qualities in himself. Before a person embarks upon swearing to strive to preserve the Islamic ideology he would bring himself to believe in that ideology and test his firmness in that belief. Before presuming his ability to guarantee to the citizens the enjoyment of the protection of law and their treatment in accordance with law he would be a believer and a true adherent of law. He would consider himself to be as much subject to law as he would wish others to be. A person who considers the Constitution and the law as the handmaid of his polity is neither qualified to be elected to the high office of the Prime Minister nor can ever be true to his Oath.'

71. Mr. Bhutto was neither on trial for corruption nor for violating the Constitution, however, the Hon'ble Judges made gratuitous remarks about these matters too. And, he 'treat[ed] the Constitution and the law as a source of unlimited power for himself which may satisfy his own inane craving for self-aggrandisement and perpetuation of his rule. Such a person, in all probabilities, would destroy the very basis of the Constitution and the law which he is sworn to uphold.' Such pontification, however, overlooked the overthrow of the constitutional order and democratic rule on 5 July 1977, and of the unabated and continuous savagery of the Constitution.

72. Another discordant note in the order of the Hon'ble Judges of the Trial Court was expounding the virtues of equality:

'Islam does not believe in the creation of privileged classes. It believes in the equality before law of all - ruler and governed alike. It is opposed to all types of class distinction. Even the Caliph, the King, the Prime Minister or the President, by whatever name the ruler may be called, is as much subject to the law of the land as any ordinary citizen.'

But no attention was paid to the exceptionalism, and untouchability of General Zia-ul-Haq, the Chief Martial Law Administrator, who had gathered, in himself, all the powers of an absolute monarch.

73. The Appellate Court could not stomach the aforesaid 'gratuitous observations in paragraphs 610 to 611 of its judgment regarding the personal beliefs of the appellant, delivering a sermon as to the mode of conduct prescribed by Islam for a Muslim ruler.' The Appellate Court, however, considered that justice would be served if these paragraphs were expunged from the judgment of the Trial Court.⁸⁴ It overlooked what was glaringly obvious - the self-expressed prejudice and bias of the Trial Court.

Adulation and Praise for a Dictator

74. The Trial Court, which had tried and convicted Mr. Bhutto, and the Appellate Court, which had dismissed his appeal, were operating when there was no constitutional rule in the country and one man's will (and whim) became legislation and his person had replaced the entire democratic order. Unfortunately, the Chief Martial Law Administrator was adulated in another case.⁸⁵ He was stated to have 'stepped in to save the country.'⁸⁶ The expression of such incredulous admiration undermined the credibility of the Appellate Court. Was it not obvious that General Zia-ul-Haq would be the direct beneficiary of a guilty verdict. If Mr. Bhutto was acquitted he may have proceeded to prosecute General Zia-ul-Haq for the crime of high treason. General Zia-ul-Haq's personal survival depended on Mr. Bhutto being found guilty. The continuation of usurped power required Mr. Bhutto to be convicted.

People's Mandate

75. General Zia-ul-Haq's unconstitutional act was 'construed in the nature of a mandate from the people of Pakistan.'⁸⁷ It was not at all necessary, nor desirable, to state how popular he was. It was not for the Supreme Court to measure populism, nor what it entailed.

Absence of Fair Trial and Due Process

76. The Supreme Court, including the three Hon'ble Judges of the Supreme Court who acquitted Mr. Bhutto,⁸⁸ had also declared, 'that the Fundamental Rights stand validly suspended since 5th of July 1977.'⁸⁹ Therefore, and admittedly, the trial was conducted and the appeal heard without Mr. Bhutto having the constitutional protection of the Fundamental Rights and other rights guaranteed in the Constitution. Any single one of the aforesaid noted transgressions may have vitiated the trial and the conviction, however, cumulatively they destroyed any semblance of due process and fair trial, and revealed that innocent men were rushed to the gallows.

The Courts

77. The Trial and Appellate Courts, which conducted the trial and heard the appeal, were not true courts under the Constitution. The country was captive to Martial Law and so too were its courts. When Judges take oath of allegiance to dictators, the courts are no longer of the people.

78. In conclusion we want to acknowledge the assistance provided by all the learned counsel and by the learned amici. However, the painstaking work undertaken by our retired colleague, Justice Manzoor Ahmad Malik, and by his team deserves special mention. The expertise, the depth of knowledge and insightfulness of criminal jurisprudence provided by Justice Manzoor Ahmad Malik was most valuable and helpful.

Sd/-

Justice Qazi Faez Isa, CJ.

Sd/-

Justice Sardar Tariq Masood, J.

Sd/-

Justice Syed Mansoor Ali Shah, J.

I will be attaching my additional note.

Sd/-

Justice Yahya Afridi, J.

I will be attaching my additional note.

Sd/-

Justice Amin-ud-Din Khan, J.

Sd/-

Justice Jamal Khan Mandokhail, J.

Sd/-

Justice Muhammad Ali Mazhar, J.

I will contribute my opinion also in support of opinion dated 6.3.2024.

Sd/-

Justice Syed Hasan Azhar Rizvi, J.

I will attach my separate additional note in support of our opinion dated 6.3.2024.

Sd/-

Justice Musarrat Hilali, J.

SYED MANSOOR ALI SHAH, J.---In the short opinion dated 6 March 2024, we unanimously opined that '[i]n its advisory jurisdiction under Article 186 of the Constitution, this Court cannot reappraise the evidence and undo the decision of the case'. Furthermore, it was observed that '[t]he advisory jurisdiction under Article 186 of the Constitution requires this Court to render an opinion on any question of law of public importance referred by the President', and that in the present Reference, 'the question of law, in essence, is whether the requirements of due process and fair trial were complied with in the under trial of Mr. Zulfiqar Ali Bhutto ("Mr. Bhutto"), the former Prime Minister of Pakistan, by the trial court (the Lahore High Court) and the appellate court (the Supreme Court)'. The reason for so restricting the scope of inquiry in the present Reference was grounded in the settled jurisprudence on the advisory jurisdiction of this Court, which holds that in its advisory jurisdiction, this Court cannot undertake a fact-finding inquiry, adjudicate a lis between parties or review its judgment rendered in its adjudicatory jurisdiction.¹

2. I have gone through the detailed opinion authored by the Chief Justice and find that certain discussions and observations made therein, in my view, verge on reappraisal of the evidence in a case that has already been finally decided by this Court in its adjudicatory jurisdiction, thus going beyond the scope of inquiry set in the short opinion. With respect, I find myself unable to associate with such discussions and observations. Therefore, I add this note to briefly underscore the violations of the fundamental right to procedural due process and fair trial that occurred in the murder trial of Mr. Bhutto, as per the question of law taken up and answered in the short opinion. The facts forming the background of the present Presidential Reference and the questions of law referred to this Court for its advisory opinion have been comprehensively mentioned and discussed in the detailed opinion authored by the Chief Justice, and therefore, need no reiteration. While addressing the said violations of procedural due process and fair trial, I have drawn support from the theoretical framework of "transitional justice", which is employed to remedy the injustice caused by "political trials."

3. Around the world, authoritarian regimes use "political trials", writes Shen-Bayh,² to legitimize their seizures of power, delegitimize opponents and consolidate authority. A political trial is one whose disposition-the determination of guilt or innocence, followed by punishment---depends primarily on the accused's professed attitudes and activities in relation to the ruling regime.³ In such trials, the legal process is not employed to ensure justice or minimize errors but rather to discredit and punish political opponents. These trials often rely heavily on statements obtained during investigations from former allies or associates of the accused, who may be coerced or induced to turn against the accused. Such evidence, which would usually hold limited weight in a fair trial, becomes a convenient basis for conviction in a political trial, supporting the alleged criminality of the accused. Political trials thus serve as a potent and notorious "judicial tool" for authoritarian regimes, aimed at suppressing political resistance and eliminating opposition.⁴ These trials frequently violate due process and fair trial requirements to produce politically desirable outcomes.

4. In post-authoritarian regimes, "transitional justice" forms a crucial part of the transition from repressive authoritarianism to constitutional democracy. It involves uncovering the crimes of former authoritarian rulers and holding them accountable for past human rights violations, including unlawful detentions, imprisonments and politically motivated trials. Transitional justice, however, is not about vengeance or retribution but about a principled approach to healing and justice. Courts globally have affirmed that they must address the demands of victims for truth and justice while laying the foundation for societal reconciliation and systemic transformation. This dual focus on accountability and restoration is what sets transitional justice apart from ordinary judicial processes. Transitional justice, therefore, encompasses a set of methods through which states that have experienced fundamental human rights violations seek to distance themselves from that past and move forward in a manner consistent with the need for justice for those who have suffered from these violations.⁵ These methods of transitional justice include truth and reconciliation commissions and the criminal prosecution of former authoritarian rulers.⁶ Furthermore, holding both executive and judicial institutions accountable for their actions during the period of authoritarian repression, as well as exonerating past victims of state repression and miscarriages of justice, is essential for facilitating the transition of these state institutions toward greater respect for, and promotion of, the rule of law and fundamental human rights.⁷

5. Transitional justice serves as a vital tool for addressing injustices perpetrated under authoritarian regimes. It encompasses broader mechanisms, including revisiting flawed judicial decisions made during such regimes through compromising due process and fair trial requirements. This process helps restore fairness and legitimacy in the legal system. By revisiting and rendering opinions on the fairness and legitimacy of such decisions, the Court delivers justice to affected individuals and sends a powerful message: judicial complicity with authoritarianism will not be shielded from scrutiny. This approach reinforces judicial independence, ensures accountability for regime-orchestrated injustices, and establishes a precedent for discrediting flawed judicial decisions rendered under oppressive regimes. Such actions underscore the judiciary's commitment to constitutional principles, reminding past and future judges of their duties and the need to resist authoritarian pressure. Ultimately, this helps safeguard democracy, the rule of law and human rights.⁸

6. The silent application of transitional justice in Pakistan, aside from the present Reference, can also be found in several notable cases. These include the case upholding the conviction and sentence of General Pervez Musharraf,⁹ the case of the Sindh High Court Bar Association,¹⁰ which declared the proclamation of emergency and promulgation of PCO by General Pervez Musharraf unconstitutional, and the case of Nawaz Sharif,¹¹ another former Prime Minister of Pakistan, which reversed his conviction in the Army Chief's Aircraft Hijacking case. These cases demonstrate the importance of ensuring accountability for both executive and judicial officeholders for their actions during periods of authoritarian rule. They also serve as a reminder that transitional justice will remain a vital tool in addressing any future instances of authoritarianism and political trials.

7. The murder trial of Mr. Zulfikar Ali Bhutto, a former Prime Minister of Pakistan, serves as a classic example of a political trial, illustrating how such trials can be manipulated to advance authoritarian designs. Bhutto's trial effectively served as a potent and notorious "judicial tool" for strengthening General Zia's authoritarian regime, aimed at suppressing political resistance, eliminating opposition and ensuring the consolidation of power. It helped to entrench the repressive military authoritarian regime under which it was conducted. Instead of independent, substantive evidence, the prosecution relied heavily on confessional statements given by, or procured from, Bhutto's former associates-accomplices turned approvers.

8. Likewise, several violations of procedural due process and fair trial requirements were committed to achieve politically desirable outcomes. These included the unauthorized reinvestigation of the case, which had previously been closed by an order of the Magistrate concerned; the surreptitious and unlawful transfer of the investigation from the regular investigating agency (Provincial Police) to the Federal Investigation Agency; the transfer of the trial from the regular trial court (Sessions Court) to the High Court without adherence to legal requirements; the unjustified cancellation of bail previously granted to Bhutto by a Single Bench of the Lahore High Court; the determination of Bhutto's recusal application by judges other than the one whose recusal was sought, without addressing the instances cited to demonstrate the bias and prejudice of the judge

(Justice Maulvi Mushtaq); the composition of the trial and appellate court benches, both of which were headed by judges (Justice Maulvi Mushtaq and Justice Anwar-ul-Haq) who harboured personal grievances against Bhutto due to being passed over for appointments as Chief Justice of their respective courts-the Lahore High Court (trial court) and the Supreme Court (appellate court); and the unwarranted reconstitution of the appellate court bench from nine judges to seven judges. It is an established principle that justice must not only be done but must also manifestly and undoubtedly be seen to be done.¹² The infringement of this fundamental principle also constitutes a violation of due process and fair trial requirements. Because of these glaring violations, Bhutto is rightly regarded as the victim of "unfair judicial proceedings" and "legalized political murder"---also referred to as "judicial murder".¹³ Both the obvious procedural irregularities and illegalities in the reinvestigation and trial, as well as the biased composition of the trial and appellate court benches, rendered the verdict illegitimate and undermined the independence and impartiality of the superior courts (High Courts and the Supreme Court) for years to come.¹⁴

9. In fulfilment of our duty under the principle of transitional justice, and with the aim of distancing ourselves from past violations of fundamental human rights while moving forward in a manner consistent with justice for those who suffered from these violations, we explored all possible options within the existing constitutional and legal framework. The Constitution and the law provide no mechanism to set aside the judgment by which Bhutto was convicted and sentenced, as that judgment attained finality following the dismissal of the review petition by this Court. Furthermore, in its advisory jurisdiction under Article 186 of the Constitution, this Court lacks the authority to reappraise the evidence or overturn a final decision. However, after carefully examining the record of the reinvestigation and trial proceedings, we concluded-and so stated- that the trial proceedings in the Lahore High Court and the appellate proceedings in the Supreme Court of Pakistan did not meet the requirements of the Fundamental Right to a fair trial and due process as enshrined in Articles 4 and 9 of the Constitution,¹⁵ which were later reinforced as a separate and independent Fundamental Right under Article 10A of the Constitution. Our expression of this opinion reflects a commitment to confront past missteps and fallibilities during an authoritarian regime with humility, embodying a spirit of self-accountability and underscoring our dedication to ensuring that transitional justice shall be served with unwavering integrity and fidelity to the Constitution and the law.

10. In the end it needs to be said that the judiciary is a resilient institution, endowed with the remarkable ability to recover and rise above the shadows of authoritarianism. This resilience is not accidental but is deeply rooted in the courage and integrity of those judges who refuse to compromise and have the courage to speak truth to power. In the annals of judicial history, there are turning points when the judiciary is bold enough to confront its past mistakes and chart a course for a better future. Today marks one such moment-a testament to the judiciary's unwavering commitment to justice and the rule of law.

11. The independence of the judiciary is the cornerstone of justice, and its true test lies in a judge's ability to stand firm under authoritarian regimes. The essence of judicial independence is not found in passivity or retrospective correction but in resisting authoritarian overreach at the time it occurs. Transitional justice, while important, should serve as a sobering reminder to judges: justice delayed by decades is justice diminished. Judges must act as the first and last line of defence for the rule of law, refusing to compromise even under duress, so that societies do not have to rely on transitional processes to correct the damage inflicted by judicial capitulation. Let the lesson of transitional justice be clear-judges must uphold their oaths with courage in the face of oppression, for only then can the judiciary truly safeguard democracy and the rights of the people. Transitional justice, however, often becomes necessary because, during oppressive rule, some judges fail to uphold their constitutional duty, succumbing to the pressure of illegitimate authority. This failure not only enables violations of due process and fair trial rights but also erodes public trust in the judiciary.

12. Judges serving under authoritarian regimes must remember that their true strength lies not in holding office but in steadfastly upholding their independence and principles. Justice Dorab Patel exemplified this ideal when he courageously dissented in the Bhutto case, acquitting Mr. Bhutto of the charges, and later refused to take the oath under the Provisional Constitutional Order (PCO) promulgated by General Zia,

thereby relinquishing his impending eight-year tenure as Chief Justice of Pakistan. His actions remind us that losing a position is a small sacrifice compared to compromising one's integrity or leaving behind a legacy of submission or compromise. Judges must always bear in mind that a judge's valour is measured by his courage to resist external pressures, stand firm against interference and safeguard the independence of the judiciary without fear or favour. Delay in confronting authoritarian inroads can prove fatal to the rule of law-such incursions must be resisted and rectified immediately, for the judiciary's role is to defend justice, not enable its erosion. I find no more suitable words to close this note than those of Bhutto himself, reflecting both a powerful critique of authoritarianism and a firm belief in the judiciary's essential role as a guardian of democracy. He wrote:

An independent Judiciary is the antithesis of Martial Law An independent Judiciary can only function under the umbrella of the Constitution and not under the shadow of the gun..... An independent Judiciary exists side by side with an executive chosen by the people and a legislature elected by them. But the people's Executive is in jail. The assemblies ... have become as silent as the graveyards. Can one flower flourish in a garden turned into a desert?¹⁶

Sd/-

Syed Mansoor Ali Shah

Judge

YAHYA AFRIDI, J.---I have had the privilege of going through the detailed opinion of Justice Qazi Faez Isa, the Chief Justice, as well as the additional notes of Justice Syed Mansoor Ali Shah and Justice Syed Hasan Azhar Rizvi, in furtherance to the unanimous short opinion of this Court dated 06.03.2024 ("Short Opinion").

2. I find myself in agreement with the observation of Justice Syed Mansoor Ali Shah that certain portions of the detailed opinion of the Chief Justice verge on reappraisal of evidence in a case that has already been finally decided by this Court in its adjudicatory jurisdiction, and thus, the same exceed the scope of the inquiry delineated in the Short Opinion that '[i]n its advisory jurisdiction under Article 186 of the Constitution, this Court cannot reappraise the evidence and undo the decision of the case'.

3. As to the question of law, whether the requirements of due process and fair trial were complied with in the murder trial of Mr. Zulfiqar Ali Bhutto, the former Prime Minister of Pakistan, by the trial court (the Lahore High Court) and the appellate court (the Supreme Court), I fully concur with the observations given in paragraphs No. 23 to 25, 31, 58 to 64 and 67 to 76 of the detailed opinion rendered by the Chief Justice, as well as paragraph No. 8 of the note authored by Justice Syed Mansoor Ali Shah, which highlight the violations of procedural due process and fair trial requirements.

4. I also record my concurrence, for the reasons given therein, with the view of Justice Syed Hasan Azhar Rizvi that the observation of the Chief Justice - that Article 185(2)(b) of the Constitution and sections 411-A and 526 of the Code of Criminal Procedure, 1898 do not permit the High Court to conduct a murder trial - is untenable, as it is founded on a misconception of these provisions. I further agree with the opinion of Justice Syed Hasan Azhar Rizvi that Chapter XXVII of the Code of Criminal Procedure, 1898 does not extend to death sentences passed by the High Court in the exercise of its original criminal jurisdiction. Consequently, I respectfully differ from the view of the Chief Justice that these provisions necessitate confirmation of such sentences or lead to the forfeiture of the right of appeal, as such an interpretation is contrary to the established legal framework.

5. It is, however, very pertinent to note that the present reference was avowedly filed against the backdrop of the restoration of the judiciary and the proactive role of the restored judiciary in addressing the matters of public importance. In this context, the reference drew attention, inter alia, to the 'admission' of former Chief Justice of Pakistan, late Justice Nasim Hasan Shah, regarding external pressures in the decision of the appeal of Mr. Zulfiqar Ali Bhutto, which the reference described as a regrettable chapter in judicial history of our nation.

6. In consideration of the above, I am of the view that this reference might never have come before us but for the events recounted and the facts disclosed in the interview and autobiography of Justice Nasim Hasan

Shah. Accordingly, it is both relevant and necessary to address certain aspects of that interview and autobiography, which raise significant concerns regarding the due process and fairness of the trial of Mr. Zulfiqar Ali Bhutto, as discussed in the following paragraphs.

7. In the Supreme Court judgement, Justice Nasim Hasan Shah rejected the contention that the trial of Mr. Zulfiqar Ali Bhutto was vitiated by bias on the part of Justice Maulvi Mushtaq Hussain, who presided over the Lahore High Court Bench that conducted the trial. However, this stance stands in direct contradiction to his later remarks in an interview with Iftikhar Ahmad for the program Jawab Deyh. In the aforesaid interview, Justice Nasim Hasan Shah described Justice Maulvi Mushtaq Hussain as an overt enemy of Mr. Zulfiqar Ali Bhutto, expressing that he should not have been part of the Lahore High Court Bench. In fact, the presence of Justice Maulvi Mushtaq Hussain on the Lahore High Court Bench was referred to as "Ziadati", a term that, within the context of the trial, could only be interpreted as bias. This clear contradiction in the views of Justice Nasim Hasan Shah raises concerns about the evaluation, in the appeal, of the question of bias on the part of Justice Maulvi Mushtaq Hussain.

8. Justice Nasim Hasan Shah revealed certain facts in his autobiography *Memoirs and Reflections*, which suggest that his inclusion in the Bench for the purpose of hearing the appeal of Mr. Bhutto was orchestrated by the Attorney General Sharifuddin Pirzada and Justice Maulvi Mushtaq Hussain. Such manipulation of the Bench composition undermines judicial impartiality and raises serious concerns about the fairness of the proceedings. It also shows that Justice Maulvi Mushtaq Hussain pursued the matter zealously even after the High Court had decided the case and the appeal was pending before the Supreme Court, despite his role having concluded with the decision of the High Court. This unwarranted involvement after conviction blurred the boundaries of judicial propriety and further eroded confidence in the impartiality of the appellate process.

9. The above account of events effectively undermines the duly expected impartiality of judicial decision-making in the trial of Mr. Zulfiqar Ali Bhutto. Such events, if left unaddressed, risk eroding public confidence in the fairness of the judicial process.

10. The extraordinary political climate of the time and the pressures inherent in such an environment appear to have influenced the course of justice in a manner inconsistent with the ideals of judicial independence. It is a sobering reminder of how deviations from constitutional governance can exert undue influence on judicial proceedings in politically charged cases, undermining the ideals of impartiality and due process in such exceptional circumstances. This also accentuates the importance of recognizing the courageous dissents of Justice Dorab Patel, Justice Muhammad Haleem and Justice G. Safdar Shah who stood their ground despite the prevailing atmosphere. Their dissents, even if unsuccessful in altering the outcome, remain a testament to the enduring principles of judicial integrity and impartiality, underscoring the value of an independent judiciary committed to the rule of law.

Opinion

11. In light of the foregoing discussion, I am of the considered opinion that the requirements of due process and fair trial were not complied with in the murder trial of Mr. Zulfiqar Ali Bhutto by the trial court and the appellate court.

Sd/-

Yahya Afridi

Judge

SYED HASAN AZHAR RIZVI, J.—Before I express my concurrence with the detailed opinion authored by Mr. Justice Qazi Faez Isa, Hon'ble Chief Justice of Pakistan, I find it imperative to pen down a few additional observations that resonate with the conclusions reached therein. While I fully agree with the reasoning except those mentioned in para 26 to 30 and the outcome of the detailed opinion, the significance of the issues presented before this Court compels me to elaborate on certain aspects that reinforce our collective judicial philosophy. The case at hand touches upon the intricate application of legal principles and reflects the broader constitutional ethos that guides our jurisprudence. It is with a deep sense of responsibility and a commitment to the rule of law that I concur with the conclusion of the detailed opinion. However, I believe that certain nuances warrant further emphasis to underscore the contours of our legal landscape and to provide

clarity for future jurisprudence. In aligning with the detailed opinion, I am mindful of the weighty considerations that have been accurately analyzed by the Chief Justice. The legal discourse presented therein is both thorough and compelling, leaving little room for dissent. Yet, it is the hallmark of a robust judicial system to allow for the expression of supplementary views that may fortify the decision's legal foundation and contribute to the richness of our legal tradition. Therefore, in the spirit of judicial comity and to enhance the legal reasoning that forms the crux of opinion by this Court, I offer the following observations.

2. Before delving into the intricate details of the case, let us first provide a concise overview of the key facts and events that set the stage for this reference. Briefly, Mr. Ahmad Raza Kasuri got registered an FIR No.402/74 dated 11.11.1974 for the offences under section 302/307 (now 324) of the Pakistan Penal Code, 1860 ('P.P.C.'), registered at Police Station ('P.S.') Ichhra, District Lahore against some unknown accused persons for the murder of his father Mr. Muhammad Ahmad Khan ('the deceased'). Later on, seven persons (Mr. Zulfikar Ali Bhutto ('Mr. Bhutto'), Masood Mahmood, Director General Federal Security Force ('FSF'), Mian Muhammad Abbas, Director FSF, Ghulam Hussain, Inspector FSF, Ghulam Mustafa, Inspector FSF, Arshad Iqbal, Sub-Inspector FSF and Iftikhar Ahmad, Assistant Sub-Inspector (FSF) were nominated and the offences under sections 120-B/109 were also added in this case. A Full Court comprising five judges of the High Court was constituted for the trial of this case. After the trial, all the accused persons (except Masood Mahmood and Ghulam Hussain) were convicted and sentenced to death, along with other punishments, as per the judgment dated 18.03.1978, reported as PLD 1978 Lah. 523, pp. 618-622. A criminal appeal filed against the decision of the High Court was dismissed by this Court vide judgment dated 06.02.1979, reported as PLD 1979 SC 53. The review petition filed by Mr. Bhutto was also dismissed by this Court vide judgment dated 24.03.1979, reported as PLD 1979 SC 741. Finally, Mr. Bhutto was executed on 04.04.1979.

3. Since Mr. Bhutto's execution, one of Pakistan's major political parties, the Pakistan People's Party (PPP), has consistently questioned the fairness of the judicial process, alleging that it was influenced by the then-military dictatorship as well as political factors and as such lacked impartiality. The party views the trial of Mr. Bhutto and his subsequent execution as a miscarriage of justice, which remains a sensitive issue in Pakistani politics. In 2011, this longstanding grievance prompted the then-President of Pakistan, Asif Ali Zardari ('the President'), who was also Bhutto's son-in-law, to file a presidential reference under Article 186 of the Constitution of the Islamic Republic of Pakistan ('the Constitution') to seek the opinion of the Court on the legality and fairness of the original proceedings that led to Bhutto's death sentence. The reference aimed to address and rectify any historical injustices and to restore public confidence in the judiciary's impartiality. The President sought the opinion of the Court on the following questions of law:

1. Whether the decision of the Lahore High Court as well as the Supreme Court of Pakistan in the murder trial against Shaheed Zulfikar Ali Bhutto meets the requirements of fundamental rights as guaranteed under Article 4, sub-Articles (1) and (2)(a), Article 8, Article 9, Article 10A/due process, Article 14, Article 25 of the Constitution of the Islamic Republic of Pakistan, 1973? If it does not, its effect and consequences?
2. Whether the conviction leading to execution of Shaheed Zulfikar Ali Bhutto could be termed as a decision of the Supreme Court binding on all other courts being based upon or enunciating the principle of law in terms of Article 189 of the Constitution of the Islamic Republic of Pakistan, 1973? If not, its effects and consequences?
3. Whether in the peculiar circumstances of this case awarding and maintaining of the death sentence was justified or it could amount to deliberate murder keeping in view the glaring bias against Shaheed Zulfikar Ali Bhutto?
4. Whether the decision in the case of the murder trial against Shaheed Zulfikar Ali Bhutto fulfills the requirements of Islamic laws as codified in the Holy Quran and the Sunnah of the Holy Prophet (SAW)? If so, whether present case is covered by doctrine of repentance specifically mentioned in the following Suras of Holy Quran:

(a) Sura Al-Nisa, verses 17 and 18; Sura Al-Baqara, verses 159, 160 and 222; Sura Al-Maida, verse 39; Sura Al-Aaraaf, verse 153; Sura Al-Nahl, verse 119; Sura Al-Taha, verse 82; as well as

(b) Sunan Ibn-e-Maaja, Chapter 171, Hadith No. 395.

5. Whether on the basis of conclusions arrived at and inferences drawn from the evidence/ material in the case an order for conviction and sentence against Shaheed Zulfiqar Ali Bhutto could have been recorded?

4. On 06.03.2024, we unanimously rendered our short opinion (with reasons to be recorded later) on the aforementioned questions, whereby we refused to provide any assistance/ opinion on questions Nos. 2 and 4. However, as regards questions Nos. 1, 3, and 5, we opined as follows:

Opinion on Question No.1

"(i) The proceedings of the trial by the Lahore High Court and of the appeal by the Supreme Court of Pakistan do not meet the requirements of the Fundamental Right to a fair trial and due process enshrined in Articles 4 and 9 of the Constitution and later guaranteed as a separate and independent Fundamental Right under Article 10A of the Constitution.

(ii) The Constitution and the law do not provide a mechanism to set aside the judgment whereby Mr. Bhutto was convicted and sentenced; the said judgment attained finality after the dismissal of the review petition by this Court."

Opinion on Questions Nos.3 and 5

"In its advisory jurisdiction under Article 186 of the Constitution, this Court cannot reappraise the evidence and undo the decision of the case. However, in our detailed reasons, we shall identify the major constitutional and legal lapses that had occurred with respect to fair trial and due process."

5. At the beginning of my note, I mentioned that, in principle, I concur with the conclusion reached in the detailed opinion rendered by the Chief Justice. However, certain areas related to constitutional and legal lapses in the case of Mr. Bhutto require further consideration and explanation keeping in view the scope and extent of authority of this Court in the advisory jurisdiction. Moreover, I disagree with specific observations made by the Chief Justice, as outlined in paragraphs 26 to 30 of the detailed opinion. Therefore, I will first highlight and explain the major constitutional and legal lapses that undermined the proceedings of trial of Mr. Bhutto before the High Court as well as the appeal filed by him before the Supreme Court of Pakistan, causing them to fail to meet the requirements of a fair trial and due process, as enshrined in Articles 4 and 9 of the Constitution. Secondly, I, with respect, outline the reasons for my disagreement with certain observations made by the Chief Justice in the detailed opinion. To avoid repetition, I will refer to the arguments presented by the legal representatives and counsel as outlined in the detailed opinion, except for those necessary for my analysis.

Right to due process and fair trial

6. At the time of the trial of Mr. Bhutto, the right to due process and a fair trial was not explicitly enshrined as a fundamental right in the Constitution. However, these rights have now been provided under Article 10-A, introduced by the Constitution (Eighteenth Amendment) Act, 2010. Even before the addition of this article to the Constitution, the right to a fair trial and due process was well-entrenched in our jurisprudence and considered as a part of the right of access to justice enshrined in the Constitution under Articles 4 and 9. Article 4 of the Constitution states that every individual has the right to be dealt with in accordance with the law, highlighting the necessity of legal processes that are fair and just. Article 9 further reinforces this by asserting that no person shall be deprived of life or liberty except in accordance with the law. These provisions collectively emphasized the importance of lawful procedures and the protection of individual rights, even before the explicit recognition of due process and fair trial in the Constitution. Thus, from the very beginning, this Court has stressed the importance of fair criminal trials to protect the rights and interests of both the victim and the accused. A fair trial ensures that the accused has the opportunity to present a defence and challenge the evidence, while the victim's rights to be heard and to seek justice are upheld. By maintaining impartiality and balancing the interests of both parties, this Court strives to deliver justice and maintain public confidence in the judicial system. For instance, this Court, in the case of Noor Ahmad v. The State (PLD 1964 SC 120), while shedding light on the conduct of criminal trials, observed that it is a fundamental principle that the trial of an accused person should be conducted with the utmost fairness and that anything likely to cause serious embarrassment to the accused in the conduct of their defence should be avoided. The relevant paragraph is quoted below for ease of reference:"

'We are also of the same view. Even though sections 235 and 239 of the Criminal Procedure Code give a discretion to the Court to try certain persons and or offences jointly yet there are certain considerations which are more fundamental than merely the convenience of the proceeding or trial which must be kept in view when deciding as to whether the discretion should in given in case be exercised or not. In a criminal trial, as we have already observed, it is a fundamental principle that the trial of an accused person should be conducted with the utmost fairness and anything which is likely to cause nay serous embarrassment to him in the conduct of his defence should be avoided. Thus, in the present case, it seems to us that whether a collision in such circumstances constituted one transaction or not there should not have been a joint trail of the appellants before us for more than one reason Firstly because the accusations made against them did not allege any kind of joint or concerted action nor disclosed any causal connection between the respective acts of the appellants....'

7. Later, in the case of *Ch. Manzoor Elahi v. Federation of Pakistan etc.* (PLD 1975 SC 66), this Court delved into the concept of 'due process' and on pages 109, 119, and 120 of the judgment provided a detailed explanation of what 'due process' entails. The Court emphasized the importance of legal procedures that ensure fairness, justice, and the protection of individual rights. The relevant paras of the judgment are reproduced hereunder for ease of reference:

'Article 4 may be compared 'with the due process of law in the American Constitution. The case of *Government of West Pakistan v. Begum Agha Abdul Karim Shorish Kashmiri* PLD 1969 SC 14, supports this view. In the case under report Article 2 of the 1962 Constitution which is corresponding to Article 4 of the Constitution was considered and the Court observed as follows:-

"The words 'in an unlawful manner' in sub-clause (b) of Article 98(2) have been used deliberately to give meaning and content to the solemn declaration under Article 2 of the Constitution itself that it is inalienable right of every citizen to be treated in accordance with law and only in accordance with law. Therefore, in determining as to how and in what circumstances a detention would be in an unlawful manner one would inevitably have first to see whether the action is in accordance with law, if not, then it is action in an unlawful manner. Law is here not confined to statute law alone but is used in its generic sense as connoting all that is treated as law in this country including even the judicial principles laid down from time to time by the superior Courts. It means according to the accepted forms of legal process and postulates a strict performance of all the functions and duties laid down by law. It may well be as has been suggested in some quarters, that in this sense it is as comprehensive as the American 'due process' clause in a new garb. It is in this sense that an action which is mala fide or colourable is not regarded as action in accordance with law. Similarly, action taken upon extraneous or irrelevant considerations is also not action in accordance with law. Action taken upon no ground at all or without proper application of the mind of the detaining authority would also not qualify as action in accordance with law and would, therefore, have to be struck down as being action taken in an unlawful manner."

Frontier Crimes Regulation was an "existing law" under Article 225 of the 1962 Constitution and Article 280 of the Interim Constitution. It continues to be an "existing law" under Article 268 of the present Constitution. The regulation has, therefore, always been and still is an existing law operating subject to the Constitution of the day.

Since the continued operation of the Frontier Crimes Regulation is subject to the Constitution a question arises whether the Regulation is 'law' within the meaning of Articles 4 and 9 of the Constitution. In the case reported in PLD 1969 SC 14, this Court has had occasion to observe that "law" in Article 2 of the 1962 Constitution (corresponding to Article 4 of the Constitution) is as comprehensive as the American "due process of law" clause in a new garb. A reference, therefore, to the views of the American jurists as contained in 16 American Jurisprudence will, be helpful to the discovery of the true meaning of the word "law" as contained in the said two Articles of the Constitution. The following are the extracts from that book:--

- Due process of law' must be understood to mean law in the regular course of administration through Courts of justice (Vide 16 American Jurisprudence 2d paragraph 546).

- It means law according to the settled course of judicial proceedings or in accordance with natural, inherent, and fundamental principles of justice, enforceable in the usual modes established in the administration of government with respect to kindred matters.
- A general law administered in its legal course according to the form of procedure suitable and proper to the nature of the case, conformable to, the fundamental rules of right and affecting all persons alike, is 'due process of law'.
- Due process has to do with the denial of fundamental fairness shocking to the universal sense of justice; it deals neither with power nor with jurisdiction, but with their exercise.
- 'Law embraces all legal and equitable rules defining human rights and duties and providing for their enforcement, not only as between man and man, but also between the State and its citizens. (Vide 16 American Jurisprudence 2d paragraph 546).
- It is a general public law of the land (paragraph 547).
- It is the law that operates on all persons alike and do not subject the individual to the arbitrary exercise of the powers of Government.
- Under the 'due process of law' no change in procedure can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action which relate to process of law, protect the citizen in his private right and guard him against the arbitrary action of Government (paragraph 549).
- Substantive due process has been roughly defined as the constitutional guarantee that no person shall be deprived of his life, liberty, or property for arbitrary reasons, such deprivation being constitutionally supportable only if the conduct from which the deprivation follows is prescribed by reasonable Legislation (i.e. the Legislation the enactment of which is within the scope of legislative authority) reasonably applied (that is, for a purpose consonant with the purpose of the Legislation itself). To the extent that arbitrary action involves procedural arbitrariness, such action is, of course, barred by the principles of due process. In general terms it has been stated that the requirement of due process of law may be satisfied if there is no unauthorised and merely arbitrary exercise of the powers of Government to the detriment of the people or of some of them.
- It has been authoritatively stated that the right of a citizen to due process of law must rest upon a basis more substantial than favour or discretion, and in many instances statutes have been held unconstitutional on the ground that they operated to vest in the Courts or in other officials an arbitrary power over matters protected by the Constitution (paragraph 550)."

Applying the concept of 'law' as contained in the extracts just quoted, section 11 of the Frontier Crimes Regulation (hereinafter called the F. C. R. which empowers the Deputy Commissioner to refer the determination of the guilt or otherwise of a person to the "Council of Elders," does not seem to me to be "law" as contemplated in Articles 4 and 9 of the Constitution. The section gives unfettered powers to the Deputy Commissioner to refer the said question for decision to a Council of Elders, if he thinks it inexpedient that the matter should be determined by any Court of the classes prescribed in section 6 of the Code of Criminal Procedure. No guidance, at all, has been laid down in what circumstances the reference to the Council of Elders should be made. No rule of procedure or evidence has been prescribed for a proceeding before such Council. The Council is not prevented from adopting methods which are arbitrary and inconsistent with reason and the civilised decencies. The section has nothing to do with the regular course of administration through Courts of justice, and does not exclude arbitrary action involving procedural arbitrariness. It constitutes a denial of fundamental fairness shocking to universal sense of justice.'

8. In "Constitution of the Islamic Republic of Pakistan: A Commentary on the Constitution of Pakistan, 1962," by Muhammad Munir, former Chief Justice of Pakistan, it is mentioned on page 197 that in a criminal trial, an accused person has the following important rights under the general law:

- '1. The right to know before the trial the charge and the evidence against him;
2. The right to cross-examine the prosecution witnesses;
3. The right to produce evidence in defence;
4. The right to appeal or to apply for revision;
5. The right to be represented by counsel;

6. The right to have the case decided by the Judge who heard the evidence;
7. The right to trial by jury or with the aid of assessors;
8. The right to certain presumptions and defences; and
9. The right to apply for transfer of the case to another Court.'

The above rights were approvingly referred to and endorsed by a five-member bench of this Court in the case of Brig. (Retd.) F.B. Ali and another v. The State (PLD 1975 SC 506). In this case, the Court, with respect to the above list of rights, observed that the rights (except the right mentioned at serial No.7 which is no longer available in Pakistan) enumerated by Mr. Munir are clearly available in a trial even by a Court Martial.

HIGH COURT AS A COURT OF ORIGINAL CRIMINAL JURISDICTION

9. In our country, the Code of Criminal Procedure, 1898 ('Cr.P.C.'), as the general law of the land, governs the procedure for conducting criminal trials in all criminal courts. Even where special criminal laws are silent on certain matters, the courts take guidance from and follow the principles laid down in the Cr.P.C. Undoubtedly, under the scheme of the Cr.P.C., the High Courts fall within the category of Criminal Courts and can try any offence under the P.P.C. A detailed procedure for trial before the High Court has been outlined in Chapter XXII-A of the Cr.P.C. For a better understanding of the above legal position, the relevant provisions of the Cr.P.C. (as existed at the time of the trial of Mr. Bhutto) are discussed below:

Section 6, Cr.P.C. provides the different classes of Criminal Court and Magistrates as follows:

"6. Classes of Criminal Courts and Magistrates: (1) Besides the High Courts and the Courts constituted under any law other than this Code for the time being in force, there shall be five classes of Criminal Courts in Pakistan, namely: -

- (I) Courts of Session;
- (II) ***[1](#)
- (III) Magistrate of the first class;
- (IV) Magistrate of the second class;
- (V) Magistrate of the third class."

Emphasis supplied.

Section 28, Cr.P.C. states about the courts, competent to try offences under the P.P.C in the following words:

"28. Offences under Penal Code: Subject to the other provisions of this Code any offence under the Pakistan Penal Code may be tried-

- (a) by the High Court, or
- (b) by the Court of Session, or
- (c) by any other Court by which such offence is shown in the eighth column of the Second Schedule to be triable."

Emphasis supplied.

Section 190, Cr.P.C. prescribes a mode for taking cognizance of an offence under P.P.C. as follows:

'190. Cognizance of offences by Magistrates. (1) Except as hereinafter provided, any District Magistrate or Sub-Divisional Magistrate, and any other Magistrate specially empowered in this behalf, may take cognizance of any offence-

- (a) upon receiving a complaint of facts which constitute such offence;
- (b) upon a report in writing of such facts made by any police officer;
- (c) upon information received from any person other than a police officer, or upon his own knowledge or suspicion, that such offence has been committed.

(2) The Provincial Government, or the District Magistrate subject to the general or special orders of the Provincial Government, may empower any Magistrate to take cognizance under subsection (1), clause (a) or clause (b), of offences for which he may try or send to the Court of Sessions for trial.

(3) A Magistrate taking cognizance of an offence under subsection (1) of an offence triable exclusively by a Court of Session shall, without recording any evidence, send the case to the Court of Session for trial.'

Emphasis supplied.

Section 193, Cr.P.C. mandates that the Court of Sessions is not authorized to take cognizance of any offence as a court of original jurisdiction unless the case has been sent to it under section 190(3) supra. This provision of law is also reproduced hereunder for ease of reference:

'193. Cognizance of offence by Courts of Sessions.

(1) Except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Sessions shall take cognizance of any offence as a Court of original jurisdiction unless the case has been sent to it under section 190, subsection (3).

(2) Additional Sessions Judges and Assistant Sessions Judges shall try such cases only as the Provincial Government by general or special order may direct them to try, or as the Sessions Judge of the Division, by general or special order, may make over to them for trial.'

Emphasis supplied.

Section 194, Cr.P.C. provides for the taking of cognizance of offences by the High Court as follows-

'194. Cognizance of offences by High Court: (1) The High Court may take cognizance of any offence in manner hereinafter provided.

Nothing herein contained shall be deemed to affect the provisions of any Letters Patent or Order by which a High Court is constituted or continued, or any other provision of this Code.

(2) (a) Notwithstanding anything in this Code contained the Provincial Government, exhibit to the High Court, against persons subject to the jurisdiction of the High Court, information for all purposes for which Her Majesty's Attorney-General may exhibit informations on behalf of the Crown in the High Court of Justice in England.

(b) Such proceedings may be taken upon every such information as may lawfully be taken in the case of similar informations filed by Her Majesty's Attorney-General so far as the circumstances of the case and the practice and procedure of the said High Court will admit.

(c) All fines, penalties, forfeitures, debts and sums of money recorded or levied under or by virtue of any such information shall form part of the revenues of the Province.'

Emphasis supplied.

10. As per the mandate of section 28, Cr.P.C., the High Court and the Court of Session have concurrent jurisdiction along with subordinate courts to try offences under the P.P.C. The Court of Session, unlike the High Court, is not a court of original criminal jurisdiction. As section 193 of the Cr.P.C. places a complete and clear bar on taking cognizance of any offence by the Court of Session in its original jurisdiction unless the case is sent to it by a Magistrate under section 190(3), Cr.P.C. Section 190(3), Cr.P.C., prescribes a mode of transmitting criminal cases (exclusively triable by the Court of Session) by a Magistrate after taking its cognizance under section 190(1) of the Cr.P.C. to the Court of Session, without recording evidence, for trial. It may be noted that the Magistrate taking cognizance of the offence will decide the forum competent to try the offence keeping in view the provision of section 30 as well as Schedule II to the Cr.P.C. No departure from this procedure ordinarily is possible. A perusal of Column 8 of Schedule II, Cr.P.C., indicates that the High Court is not mentioned as one of the courts competent to try offences under the P.P.C. Under this column, either the offences are triable by the Court of Session or by a Magistrate. However, Section 194 of the Cr.P.C. authorizes the High Court to directly take cognizance of any offence under the P.P.C., even though the High Court is not mentioned in Column 8 of Schedule II of the Cr.P.C. as a Court competent to try any offence. The above-stated position was quite different before the promulgation of the Law Reforms Ordinance, 1972 whereby the words appearing in section 194(1) "upon a commitment made to it" were omitted. Before the said Ordinance, the provision of section 194(1) was as under:

'194. Cognizance of offences by High Court: (1) The High Court may take cognizance of any offence, upon a commitment made to it, in manner hereinafter provided.'

11. Thus, prior to the amendment of subsection (1) of section 194, Cr.P.C. as it has been indicated hereinabove the High Court had no jurisdiction to directly take cognizance of the offence except upon a commitment made to it in the manner provided thereafter but after the amendment of subsection (1) of section

194, Cr.P.C. jurisdiction has been conferred upon the High Court to take cognizance of any offence directly. So far as the term 'in manner hereinafter provided' is concerned it has been noticed that the said term has already been explained by a two-member bench of this court in the case of Dr. Muhammad Afzal and others v. The State (2001 SCMR 1615). The Hon'ble bench, after a thorough examination of the legal provisions on the subject, concluded that, '...High Court can take cognizance of offence of Pakistan Penal Code under section 194, Cr.P. C. in the same manner as cognizance is taken under section 190(1)(c), Cr.P.C. by a Magistrate namely upon an information received from any person other than a police officer or upon his own knowledge or suspicion that such offence has been committed.' In addition, the High Court may withdraw for trial any case pending before any subordinate court while exercising its powers under Section 526, Cr.P.C. However, whether the High Court takes direct cognizance of a case or withdraws it from a subordinate court, it must follow the procedure for trial as provided under Chapter XXII-A of the Cr.P.C.

MAJOR CONSTITUTIONAL AND LEGAL LAPSES IN THE CASE OF MR. BHUTTO

12. Keeping in mind the above-settled principles and procedures to be adhered to while conducting a criminal trial, and after a thorough scrutiny of the entire record of Mr. Bhutto's case from the trial court/High Court up to this Court, I have found the following major constitutional and legal lapses that caused the proceedings of the trial of Mr. Bhutto to fail to meet the requirements of a fair trial and due process:

D) Biased Conduct of the Acting Chief Justice

In this case, the incomplete report/Challan under section 173, Cr.P.C. ('Challan') was submitted before the concerned area Magistrate on 11.09.1977. As the said Magistrate was not competent to try an offence punishable under section 302 P.P.C. (the main offence in the case), he, therefore, forwarded the same under section 190(3), Cr.P.C. to the Court of Session for trial. The record shows that on 13.11.1977, the State, through the Special Prosecutor, filed a petition, i.e., Criminal Misc. Application No. 127- T of 1977, for transfer of the criminal cases pending before a Court of Session at Lahore. The petition was fixed before the Acting Chief Justice, Mushtaq Hussain, who, on the same day, withdrew the case from the Court of Session and transferred it to the High Court and constituted a Full Court comprising five judges of the High Court for the trial of the case, and also adjourned the case to 24.09.1977 for hearing, vide the same judicial order dated 13.09.1977 (as reproduced in para 15 of the detailed opinion).

It would not be out of place to mention here that Chapter 1 of Volume-V of the High Court Rules and Orders deals with the Judicial Business of the High Court. Its Part A(b) prescribes a procedure for the disposal of petitions for the transfer of criminal cases. Rule 5 provides, 'the petitions for transfer of cases shall ipso facto be treated and dealt with as urgent petitions'. Rule 6 provides, 'Notice of the hearing of urgent petitions shall not be given individually to the petitioner or his counsel but a list of such petitions shall be hung up for the purpose on the notice board outside the Deputy Registrar's room and/or displayed in electronic media on the day proceeding the date fixed for the hearing of these petitions giving the name of the Judge by whom the petition will be heard.' Rule 7 provides, 'In petitions for transfer of cases under section 526, Criminal Procedure Code, filed in the High Court, the Sessions Judge shall, without fail, return all notices received by him from the High Court, whether for himself or for parties, after service, within one week from the date of their receipt.' Rule 8, Part A(b) further provides that 'The Sessions Judge shall, without fail, also submit, within one week from the date of receipt of the High Court letter, all reports or explanations called for by the High Court from himself or the Magistrate concerned with regard to allegations contained in the petitions for transfer or affidavit, copy whereof will accompany the said letter.' However, the then Acting Chief Justice sidestepped the above-noted prescribed procedure and, without giving/issuing any notice to the Court of Session/trial court for service to the parties, displaying the same in electronic media, or seeking any report or explanation from the Court of Secession/trial court with regard to allegation contained in the petition, passed the order dated 13.09.199 in a hasty manner.

Furthermore, he (the Acting Chief Justice) did not satisfy any of the conditions/grounds mentioned in section 526(1) (a-e) for exercising his jurisdiction under the said provision of law. The said order is also silent on the fact of what urgency or exigency necessitated the Acting Chief Justice to constitute a Full Bench for trial through a judicial order instead of a special order as required under Part-B of Chapter 3 of the High Court

Rules and Orders. Without having any lawful authority, he, vide the said order, fixed the next date of hearing in the main case, even though the case file was not before him. Under the law, after the constitution of the Full Court/trial court, it is the exclusive power of the Full Court/trial court to fix the next hearing date at its convenience. All the aforementioned facts indicate his undue favor to someone against Mr. Bhutto. Even otherwise, the language of the order dated 13.09.1977 'In view of the submissions made in the petition the case is transferred to this Court for trial' ex -facie speaks volumes about his apparent bias or impartiality against Mr. Bhutto.

II) Non-observance of Prescribed Procedure by the Full Court

On September 24, 1977, the Full Court took up Mr. Bhutto's case for the first time and delivered the requisite copies to the accused persons (Mr. Bhutto, Mian Muhammad Abbas, Arshad Iqbal, Rana Iftikhar, and Ghulam Mustafa) under section 265-C, Cr.P.C. The Court also summoned the evidence for October 2, 1977. As previously mentioned, the Full Court was bound to follow the procedure for trial as provided under Chapter XXII-A of the Cr.P.C. Under this chapter, section 265-D stipulates that if, after perusing the police report or the complaint and all other documents and statements filed by the prosecution, the Court is of the opinion that there is ground for proceeding with the trial of the accused, it shall frame in writing a charge against the accused. However, the Full Court did not frame any charges against the accused persons, thereby ignoring the above mandatory provision of law and directly summoned the evidence. This implies that the Full Court had already formed its opinion to proceed with the trial even without perusing the record. However, the charges were formally framed against the accused person on October 11, 1977.

On November 5, 1977, Mr. Bhutto filed an application before the Full Bench, expressing his apprehension that a fair and impartial trial would not be conducted in his case. The Full Court, instead of disposing of the application, observed, 'This application be placed on record, which shall be disposed of in accordance with law, after the trial.' I find this course of action adopted by the Full Court difficult to understand. The application should have been disposed of promptly, considering that the accused was expressing distrust in the Court. However, the Court seemed adamant about concluding the trial without addressing the concerns raised by Mr. Bhutto.

III) In-Camera Trial Without Any Justification

On January 24, 1978, Mr. Bhutto informed the Full Bench that he had boycotted the trial after the cross-examination of Ghulam Hussain (PW.34) and, therefore, he was not prepared to answer any questions under section 342 of the Cr.P.C., which were directly related to his defence. Upon this, the Full Court made a general observation that the accused (Mr. Bhutto) had made several scurrilous, scandalous, and baseless attacks on the impartiality of the Bench. Consequently, the Court, solely based on the above reason, directed that the proceedings of the case be held in camera. It further ordered that no part of the in-camera proceedings would be published in any form whatsoever. Section 352, Cr.P.C. provides that the place in which any Criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed an open Court, to which the public generally may have access, so far as the same can conveniently contain them. This provision of law, however, provides an exception to the above general rule that the Presiding Judge may, if he thinks fit, order at any stage of any inquiry into or trial of, any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the Court.

I would feel no hesitation to observe here that this was a trial of a prominent politician who was also the head of a major political party and had served as the Prime Minister of the country. Against whom allegations of criminal conspiracy levelled by another politician in connection with the murder of his father. This situation created a compelling need for an open trial to ensure that justice was not only done but also perceived to be done transparently. An almost similar observation has been made by a five-member bench of this Court in *Syed Ali Nawaz Gardezi v. Lt.-Col. Muhammad Yusuf* (PLD 1963 SC 51) wherein the said Hon'ble Bench upheld the findings of the trial court, which ordered an open trial for the accused because the accused was a high-ranking government official. This decision highlights the importance of transparency and public scrutiny in cases involving individuals in significant positions of authority. In light of these considerations, it appears that the Full Bench did not exercise its discretion appropriately by ordering an in-

camera trial and caused serious prejudice to the accused, Mr. Bhutto in contumacious disregard of the law previously declared by this Court in the Nawaz Gardezi case supra.

IV) Denial of the Right to Defend

Similarly, On January 28, 1978, the request of Mr. Bhutto for the supply of a copy of his statement recorded under section 342, Cr.P.C. on January 25, 1978, was declined (with the permission only to see that statement) for the reason that the proceedings were held in camera. In the case of Mr. Bhutto, the legal requirements for a fair trial, such as due notice and the opportunity to defend oneself, appear to have been compromised, as he was not provided with the materials necessary to prepare his defence effectively. This could possibly undermine the fairness and integrity of the trial proceedings. A fair trial for a criminal offence involves not only the technical observance of the framework and formalities of the law but also the recognition and just application of its substantive principles to ascertain the truth and prevent miscarriage of justice.

V) Erroneous Appreciation of Evidence of Approver

There is no denying the fact that there was no direct evidence in this case, which was solely based on the evidence of the approvers Masood Mahmood and Mian Muhammad Abbas. Under section 133 of the Evidence Act, 1872 (now Article 16 of the Qanun-e-Shahadat Order, 1984), an accomplice is a competent witness against an accused person. Thus, the evidence of an accomplice holds significant importance in the criminal justice system, particularly in cases where direct evidence is scarce. An approver is a participant or accomplice in a crime who agrees to testify against their fellow accused in exchange for leniency or a pardon. However, the evidence of an approver is treated with caution due to the inherent risk of unreliability and the possibility of ulterior motives. Section 114, illustration (b) of the Evidence Act, 1872 (now Article 129, illustration (b) of the Qanun-e-Shahadat Order, 1984), reinforces this caution by requiring that the testimony of an approver be corroborated in material particulars by independent and reliable evidence. This corroboration is necessary to ensure that the testimony of the approver is truthful and not fabricated to secure their own benefit. This Court in the case of Ghulam Qadir and another v. The State (PLD 1959 SC (Pak.) 377) had a chance to examine the evidentiary value of an approver. After a thorough analysis of the material available on record and the law on the subject, a 3-member bench of this Court laid a normal standard of corroboration for the acceptance of the evidence of an approver in a criminal case. S. A. Rahman, J.- (as he then was) speaking for the bench observed as under:

'As a matter of strict law, the uncorroborated testimony of an accomplice could, if accepted, form the basis of a conviction in a criminal case. However in the course of judicial precedents, a rule of prudence has been evolved under which it is always insisted that there ought to be independent corroboration of an approver's statement on material points suggesting a link between accused persons and the crime before such a statement could be accepted as a safe foundation for their conviction. The reason for the rule is obvious. There is always danger of substitution of the guilty by the innocent in such cases and it is realised that it would be extremely risky to act upon the statement of a self-confessed criminal who while trying to save his own skin, might be unscrupulous enough to accept suggestions of others to inculcate a person unconnected with the crime in place of his real accomplice for whom he may have a soft corner. But the corroboration required would depend on the facts and circumstances of each particular case and no hard and fast rule can be laid down in this behalf. Surely, one of the factors calling for consideration may be the circumstance that the approver had no ostensible motive to involve any of the accused persons falsely in the case. That does not imply any relaxation of normal standards of corroboration in such cases and indeed, in my humble judgment, the High Court, in the present case, does not appear to have been guilty of any such lapse.'

The above normal standard of corroboration was followed by a subsequent equal bench of this Court in the case of Abdul Khaliq v. The State (1970 SCMR 307). The bench observed, "The extent and nature of corroboration of the testimony of an accomplice may vary from case to case. The rule of practice requiring corroboration of the evidence of the accomplice is that the corroboration must be in respect of some material particulars implicating the accused, and it is not necessary that evidence of the accomplice should be corroborated in every detail of the crime.' Later, a 5-member bench of this Court in the case of Abdul Majid

and another v. The State (PLD 1973 SC 595) approvingly referred to the above observations of the earlier 3-member bench regarding the requirement of the normal standard of corroboration of the statement of an approver and decided the case accordingly.

Later a matter involving the encounter/murder of six persons by the police came for consideration before this Court in the case of Ch. Muhammad Yaqoob and others v. The State (1992 SCMR 1983). This Court after analyzing the case law from 1949 to 1991 observed that the testimony of an approver is to be scrutinized with care and caution and the Court should be doubly sure that his (approver's) evidence is corroborated in material particulars by reliable evidence. Further, this Court laid down the following principles for appreciating the evidence of an approver:

- (i) That if a statement of fact made by an accused in a confession is of the nature that if it is assumed to be true, it would negate the offence alleged to be confessed, it is called an exculpatory confession.
- (ii) That a statement of an accused that contains self-exculpatory matter cannot amount to confession.
- (iii) That a retracted confession is sufficient to sustain a conviction for a capital offence, if the Court is of the view that the same is voluntary and is true, but as a rule of prudence, it has been consistently held by the superior Courts that the same should not be acted upon unless corroborated by some other reliable evidence in material particulars.
- (iv) That though the confession of a co-accused cannot be made the foundation of conviction but it may be used in support of other evidence.
- (v) That the confession of a co-accused is an evidence of a weak character.
- (vi) That under Islamic Jurisprudence, in order to make a confession reliable, it should be voluntarily made and not on account of any coercion, duress or violence.
- (vii) That any delay in recording of a confession may, or may not, be fatal as to the evidentiary value of a retracted confession as in the case of Syed Sharifuddin Pirzada v. Sohbat Khan and 3 others (supra), this Court has held that the factum that the accused were in the police custody for 11 to 15 days, was not fatal as to the credibility of the retracted confessions for the reason that the Court was satisfied that the retracted confessions were not tutored and were, in fact, made voluntarily.
- (viii) That any lapse on the administrative side on the part of a Magistrate recording a confession, may not be fatal as to the evidentiary value of such confession provided the Court is satisfied that the lapses on his part have not, in any way, adversely affected the voluntariness or truthfulness of the confession.
- (ix) That if an accomplice's evidence is not corroborated in material respects, it cannot be acted upon and that the evidence of an accomplice cannot be used to corroborate evidence of another accomplice.

It is relevant to mention here that the provisions of sections 337 to 339, Cr.P.C., lay down the procedure for tendering a pardon to an accomplice. The combined effect of these provisions is that a pardon may be tendered with the objective of 'obtaining the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, the offence.' A pardon can be offered to such a person on the condition that he makes a full and true disclosure of all circumstances within his knowledge related to the offence and to every other person involved, whether as a principal or abettor, in its commission. It is evident that, without attempting to provide a formal definition of the term 'accomplice', the above provisions outline the criteria necessary for treating a person as an accomplice to tender a pardon. An accomplice, therefore, means a guilty associate or partner in crime, someone who is consciously connected with the offence in some way, whether before, during, or after its commission, or who makes admissions of facts showing that he had a conscious hand in the offence. If a witness

is not concerned with the commission of the crime for which the accused is charged, he cannot be said to be an accomplice in the crime. In other words, an accomplice is a *particeps criminis*, who is consciously so connected with the criminal act done by his confederate that he, due to the presence of the necessary *mens rea* and his participation in the crime in some way, can be tried alongside that confederate who actually perpetrated the crime. A witness who could not be so indicted due to the absence of *mens rea* cannot be considered an accomplice.

VI) Masood Mahmood does not qualify to be an Approver

As the case rests mainly on the evidence of the approver his evidence requires a careful scrutiny, and can only be accepted if it is supported in material particulars by other reliable evidence. Upon examining the testimony of the approver (PW-2), numerous discrepancies and irregularities have been observed.

Nonetheless,

the following significant excerpts from his evidence are reproduced below for a thorough understanding and proper appreciation of his evidence:

'In June 1974 when Mr. Ahmad Raza Kasuri was speaking in the National Assembly, Mr. Zulfikar Ali Bhutto addressed him directly and not through the Speaker as follows: He asked him to keep quiet, that he had enough of him and that he would not tolerate his nuisance anymore. This is more or less, what the Prime Minister said. A day or two later I was sent for by the prime Minister. He, inter alia, said to me that he was fed up with the obnoxious behavior of Mr. Ahmad Raza Kasuri and that Mian Muhammad Abbas, an Officer of the FSF, knew all about his activities. This officer is an accused in this Case. The then Prime Minister further told me that this officer had already been given directions through my predecessor to get rid of Mr. Ahmad Raza Kasuri. The Prime Minister went on to instruct me that I should ask Mian Muhammad Abbas to get on with the job and produce the dead body or Mr. Ahmad Raza Kasuri or his body bandaged all over.'

'On the 11th of November, 1974, I was at Multan so was Mr. Zulfikar Ali Bhutto. Very early in the morning he rang me up. He said to me, "Your Mian Abbas has made complete balls of the situation. Instead of Mr. Ahmad Raza Kasuri, he has got his father killed". I was taken by surprise. The Prime Minister hung up after telling me that he would summon me later.... Soon after that, when I returned to the Headquarters, Mian Abbas informed me and reported to me that his operation had been successful, but instead of the intended victim his father Nawab Muhammad Ahmad Khan had been murdered at Lahore'.

'As far as I remember, I left Multan in the same afternoon. I was summoned by Mr. Bhutto on our return to Rawalpindi. He was peeved and agitated. He said that the actual task had yet to be accomplished. I said to him, "at your behest, an idea conceived by you was carried out and communicated by me to Mian Abbas who already your directions through my predecessor and the fact remains that both you and I and my subordinates will be taken to task by God Almighty, but I will not carry out any such orders any more'.

In answer to a question during cross-examination, the approver (PW-2) stated that:

'I did not give any plan of mine to Mian Muhammad Abbas for committing the murder of Mr. Ahmad Raza Kasuri.

Since Mr. Abbas had assured me about the execution of the orders ive to him by the then Prime Minister, therefore, I did not give any person to him for the execution of those orders'.

A careful examination of the above-quoted excerpts from the evidence of Masood Mahmood, the approver (PW-2), reveals that he implicitly distanced himself from the alleged conspiracy involving Mr. Bhutto. He portrayed himself as an innocent and God-fearing man who merely conveyed a message from the then Prime Minister to another officer, treating it as part of his official duties. Moreover, the alleged incident took place on November 11, 1974, and he was taken into custody on July 5, 1977, with his confessional statement recorded on August 24, 1977. To substantiate his bona fides and the voluntariness of his actions, he claimed that on August 14, 1977, he wrote a letter to the Chief Martial Law Administrator, explicitly disclosing the misdeeds of the Federal Security Force, as well as his own actions wrongly carried out under the orders of Mr. Bhutto. Surprisingly, the letter was written after more than two and half years of the occurrence while he was in custody. If he had truly repented for his previous actions, he should have written that letter before his arrest. However, this stance has no value, as the letter or a copy thereof was not produced by him as evidence. He also failed to explain why he remained silent for approximately two and half years after the alleged incident and why he did not report it to the concerned authorities. Even otherwise, if his

entire statement is considered in its totality, it does not constitute any offence. His statement is free from any mens rea and is therefore exculpatory; thus, he does not fall within the category of an accomplice. However, the High Court/Trial Court did not take note of this important aspect of the matter and, relying upon the evidence of the approver, erroneously convicted Mr. Bhutto. Although, this Court, in paragraph 413 of the majority judgment, made an important observation to the effect, '...If a witness is not an accomplice in the sense indicated above, namely, on account of the absence of mens rea then the real question is not of requiring corroboration of his evidence, but of the degree of credit to be attached to his testimony, depending on all the facts and circumstances of the particular case. In other words, he has then to be judged as any other witness, without introducing an artificial' requirement of corroboration of his evidence by applying the rule contained in illustration (b) to section 114 of the Evidence Act.'

Later, the majority judgment (para 456) concluded that Masood Mahmood, the approver was a truthful and reliable witness and dismissed the appeal of Mr. Bhutto while hypothetically observing, 'that Masood Mahmood enjoyed a special position under Zulfiqar Ali Bhutto, that he was in close and constant touch with him throughout his tenure as Director-General of the Federal Security Force from 1974 to 1977, that he was shown all kinds of favours and considerations by being sent abroad for official visits and medical treatment, that he was not the only civilian official taken into custody on the proclamation of Martial Law, and that during his long career in the Police service of Pakistan, he had held important positions involving the assumption of responsibility and exercise of authority, and it was, therefore difficult to hold that Masood Mahmood had become an instrument in the hands of the Martial Law authorities to deliberately and falsely concoct the story he had narrated at such length at the trial. A further significant fact strengthening this conclusion was that even if he was pressurised to falsely implicate the former Prime Minister, there was no reason for the Martial Law authorities, or for Masood Mahmood himself to falsely assign an important operational role in the conspiracy to the appellant Mian Muhammad Abbas, who was then functioning as one of the Directors of the Federal Security Force, incharge of Operations and Intelligence...'

VII) Lack of Corroboration of Evidence of the Approver

If, for the sake of argument, it is accepted that Masood Mahmood fulfills all the requirements of being an approver, the next important legal question is whether the prosecution has succeeded in providing the necessary corroboration to support his testimony. To find the answer, I thoroughly examined the available records and was highly disappointed to find any convincing evidence to corroborate the sequence of events as alleged by Masood Mahmood, the approver. As far as the motive is concerned, it has been found from the excerpt of evidence of Masood Mahmood, as quoted above, that the motive mainly set out by the prosecution was Mr. Bhutto's speech in June 1974 in the National Assembly, where he directly addressed Mr. Ahmad Raza Kasuri and said he had enough of him and would not tolerate his nuisance anymore. In addition to this, Mr. Ahmad Raza Kasuri, while appearing as PW-1 before the High Court/Trial Court, gave a detailed account of his differences with Mr. Bhutto. Notably, he stated that he was a founding member of the Pakistan People's Party ('PPP'), formed on December 1, 1967, and was elected to the National Assembly in 1971 on that party's ticket. As he considered Mr. Bhutto a power-hungry, their relations cooled and eventually became strained. The above are the two main reasons for the involvement of Mr. Bhutto in this case, as per the prosecution evidence available on record. It is worth discussing a shocking fact: Mr. Ahmad Raza Kasuri, while appearing as PW-1, disclosed that Mr. Bhutto formally expelled him from the PPP in October 1972. In June 1973, he joined Tehrik-I-Istiqlal and then rejoined the PPP on April 6, 1976, due to an instinct for self-preservation. I am unable to understand, and even a person of ordinary prudence could not fathom, why he would rejoin a party led by someone accused of conspiring in his father's death. His rejoining is not justified in any manner, regardless of his reasoning. Based on these facts, it could be surmised that Mr. Ahmad Raza Kasuri might have been subjected to some external pressure possibly motivated by the then Martial law regime to implicate

Mr. Bhutto in the murder of his father, even though he might not have personally wished to do so or might have been convinced of Mr. Bhutto's innocence subsequently.

VIII) Motive Remained Unproved

Even otherwise, when there are open hostilities between two groups, the motive factor may propel one side to commit a crime, and the same factor may possibly induce the other group to implicate their rivals. Further, the motive is a double-edged weapon, which can be used either way and by either side i.e. for real or false involvement. Reference in this regard may be made to the cases of Noor Elahi v. Zafarul Haque (PLD 1976 SC 557); and Allah Bakhsh v. The State (PLD 1978 SC 171). Therefore, to my understanding the prosecution failed to establish the motive part of the case; but the High Court/Trial Court (in para 464 of the judgment) had erroneously held, 'the motive to kill Ahmad Raza Kasuri is proved to be on the part of the principal accused [Mr. Bhutto]'. Similarly, this Court in para 497 of the majority judgment subscribed to the finding of the High Court/Trial Court while ignoring the above apparent fundamental inconsistencies in the case of the prosecution and held that Mr. Bhutto had a strong motive to do away with Ahmad Raza Kasuri owing to their violent political differences, and the manner and the language in which Ahmad Raza Kasuri gave vent to his views against the former Prime Minister and his polices.

IX) The Retracted Confession of Mian Abbas carries no Evidentiary Value

A careful examination of the confessional statement made by Mian Abbas under section 164, Cr.P.C. shows that he also attempted to exculpate himself by laying the blame on approvers Masood Mahmood and Ghulam Hussain and incidentally implicating Mr. Bhutto in this crime. Under these circumstances, his statement cannot be treated as a confession for the purposes of section 30 of the Evidence Act, 1872 (now Article 43 of the Qanun-e-Shahadat Order, 1984). Moreover, he had initially admitted his guilt and recorded his judicial confession. However, he later retracted that confession, yet the High Court/Trial Court convicted him and sentenced him to death. During the appeal proceedings before this Court, he again changed his mind, retracted the retraction of his judicial confession, and pleaded guilty. Although a conviction can be based on a retracted judicial confession provided it is corroborated, the conduct of Mian Abbas as described above makes him a highly unreliable witness in case involving a capital sentence.

X) Impact of Negative Report of Ballistics Experts

Additionally, the negative report of the Ballistics Expert dated September 8, 1977, regarding the use of any of the 25 guns of the third Battalion of the FSF, then stationed in Walton Lahore, in the present crime undermines the entire prosecution case, not only in regard to the use of weapons belonging to this Battalion but also regarding the use of FSF ammunition. Particularly, this report is fatal to the evidence of the approver Ghulam Hussain and of the other witnesses who claimed to have supplied Short Machine Guns (SMGs) and ammunition to Ghulam Hussain for the purpose of carrying out an attack on Mr. Ahmad Raza Kasuri.

DISAGREEMENT WITH CERTAIN REASONS IN THE DETAILED OPINION

13. No doubt, the High Court, as earlier discussed, is fully competent to take direct cognizance under section 194, Cr.P.C. of a criminal case for the commission of any offence under the P.P.C. or transfer the same to itself for trial under section 526, Cr.P.C., as both provisions have existed in the Cr.P.C. since its inception in 1898. If these provisions were found to be inappropriate, the Parliament could amend or delete them in any of the subsequent amendments made after its adoption. Given the above legal position, I do not agree with the observation made in para 26 of the detailed opinion authored by the Chief Justice whereby it has been observed, 'Article 185(2)(b) of the Constitution and sections 411 -A and 526, of the Code permit trial to be conducted by the High Court, but these provisions do not provide for a High Court to conduct a murder trial.' I would feel no hesitation to state here that Section 411-A, Cr.P.C. only provides a remedy of appeal to an accused who has been convicted in a trial held by the High Court in the exercise of its original criminal jurisdiction. An exception is attached to this provision, under which no appeal lies in cases where an appeal lies to the Supreme Court under Article 185 of the Constitution. Article 185(2)(b) of the Constitution stipulates that an appeal shall lie to the Supreme Court from any judgment, decree, final order, or sentence of a High Court if the High Court has withdrawn any case for trial before itself from any court subordinate to it

and has in such trial convicted the accused person and sentenced him. As the High Court withdrew the case of Mr. Bhutto from the Court of Session/Trial Court and convicted him, his case was not covered under section 411-A, Cr.P.C. being subject to its exception clause. Therefore, Mr. Bhutto filed a direct criminal appeal before this Court under Article 185(2)(b).

14. The Chief Justice, with due respect, erred in understanding the true meaning and purpose of Article 185(2)(b) of the Constitution and sections 411-A and 526 of the Cr.P.C. Consequently, his observation that the aforementioned provisions of law permit the trial to be conducted by the High Court, but do not allow the High Court to conduct a murder trial, is untenable under the law being based on a misconception of these provisions. It is, however, true that the trial of Mr. Bhutto, for the first time, was conducted by the High Court in its original criminal jurisdiction; but now one more example can also be quoted from the recent past. Where a single bench of the Islamabad High Court tried the case of an on-duty Additional Sessions Judge, Raja Khurram Ali Khan, and his wife, Maheen Zafar, for torturing their domestic worker, Tayyaba Bibi. They were both convicted and sentenced and their criminal appeal under section 411-A, Cr.P.C., was dismissed by the Division Bench of the same High Court. See *Raja Khurram Ali Khan and another v. Tayyaba Bibi and another* (2019 YLR 98). A Criminal Appeal filed against the judgment of the Division Bench was also dismissed by this Court. See *Raja Khurram Ali Khan and 2 others v. Tayyaba Bibi and another* (PLD 2020 SC 146).

15. As far as the observation of the Chief Justice in para 27-28 of the detailed opinion regarding confirmation of the death sentence by the High Court is concerned, my understanding of the legal framework as provided under Chapter XXVII titled 'OF THE SUBMISSION OF SENTENCES FOR CONFIRMATION' is quite different. Under this chapter, the Legislature has provided valuable safeguards for the life and liberty of convicts in cases involving capital sentences. The provisions contained therein seek to ensure that in capital sentence cases, where the life of the convicted person is at stake, the entire evidentiary material bearing on the innocence or guilt of the accused and the question of the sentence must be scrutinised with utmost caution and care by a superior Court. This Chapter only deals with the sentence of death passed by a Court of Session and it has nothing to do with the sentence of death passed by a High Court while trying a case in its original criminal jurisdiction. The provision of section 374 is more than clear in this regard which states as under:

'374. Sentence of death to be submitted by Court of Session: 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'.

Emphasis Supplied.

Further, section 377 states as under:

'377. Confirmation of new sentence to be signed by two Judges: In every case so submitted, the confirmation of the sentences, or any new sentence or order passed by the High Court, shall, when such Court consists of two or more Judges, be made, passed and signed by at least two of them.'

Emphasis Supplied.

16. The above provisions are clear and require no further interpretation regarding whether a death sentence passed by a Full Bench comprising five judges of the High Court still requires confirmation by another two judges of the same Court. On a reference for the confirmation of the sentence of death, the High Court is required to proceed in accordance with sections 375 and 376, 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. If, for the sake of argument, it is accepted that the said death sentence passed by a Full Bench still requires confirmation by another two judges of the same High Court, it would be

against the spirit of the above Chapter as well as the settled law whereby a smaller bench cannot sit as an appellate authority against the decision of a larger bench even it would disturb the internal hierarchy of the High Court. For instance, Section 3(1) of the Law Reforms Ordinance, 1972, provides for an appeal to a bench of two or more judges of a High Court from a decree passed or final order made by a single judge of that Court in the exercise of its original civil jurisdiction. But no such appeal would lie if the decree or final order is made by a bench comprising more than one judge, thus rendering the said provision of law redundant. Similarly, we, for the purposes of Section 374, Cr.P.C., cannot use the terms 'Court of Session' and 'High Court' interchangeably, as both are distinct and separate judicial forums. Consequently, when the High Court passes a sentence of death in its original criminal jurisdiction, the above Chapter XXVII of Cr.P.C. becomes redundant and inoperative. However, the convict may seek the remedy of appeal under Article 185(2)(b) of the Constitution or Section 411-A, Cr.P.C., as the case may be, as discussed in the preceding paragraphs. Therefore, with such an interpretation and understanding of Chapter XXVII of Cr.P.C., I am unable to agree with the view expressed by the Chief Justice in paragraphs 27 to 30 of the detailed opinion regarding the application of Chapter XXVII, as well as the loss of the right of appeal in the case of a criminal trial conducted by the High Court in its original criminal jurisdiction, as being misconceived.

17. In conclusion, while exercising the restraint expected of me in an advisory jurisdiction, I have no hesitation in stating that no evidence whatsoever was available on record to sustain the conviction of Mr. Bhutto as recorded by the High Court/Trial Court and upheld by this Court. The evidence of the material witnesses, namely Ahmad Raza Kasuri (PW-1), Masood Mahmood (PW-2), Saeed Ahmad (PW-3), Mr. Welch (PW-4), and Ghulam Hussain (PW31) is full of contradictions, improvements, and improbabilities and was not sufficient for awarding the capital punishment to Mr. Bhutto. Even the majority of this Court erroneously subscribed to the findings of the High Court/Trial Court without carrying out any independent analysis or review of the material available on record. In short, the case of Mr. Bhutto is a bitter example of unfairness, wherein both substantive and procedural laws were misapplied to please the then-Martial Law authorities. As a result, we lost a great political leader. This case stands as a stark reminder of how legal systems can be manipulated for political gain, leading to grave injustices. The misapplication of laws in this case not only undermined the integrity of the judicial process but also eroded public trust in the legal system. It highlights the importance of judicial independence and the need for courts to be free from political influence. The loss of Mr. Bhutto, a visionary leader, was not just a blow to his supporters but to the nation as a whole, depriving it of his leadership and contributions.

18. The above are the reasons in support of the unanimous short opinion rendered by this Court on 06.03.2024.

Sd/-

Syed Hasan Azhar Rizvi

Judge

Opinion on Reference No.01/2011, filed under Article 186 of the Constitution of the Islamic Republic of Pakistan, 1973

MUHAMMAD ALI MAZHAR, J.---

Pursuant to the decision of the Federal Cabinet, the President of Pakistan, in the year 2011, filed a reference under Article 186 of the Constitution of the Islamic Republic of Pakistan, 1973 ("Constitution") seeking an opinion in respect of the proceedings of the judicial process in the case of the trial of Shaheed Zulfiqar Ali Bhutto, former Prime Minister of Pakistan (Mr. Bhutto).

For the ease of reference, the following index provides an outline of the key topics discussed in the opinion:

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I. Quintessence of Advisory Jurisdiction

2. To begin, it is expedient to reproduce, for the ease of reference, Article 186 of the Constitution as under:
Advisory Jurisdiction
186, (1) If, at any time, the President considers that it is desirable to obtain the opinion of the Supreme Court on any question of law which he considers of public importance, he may refer the question to the Supreme Court for consideration.
(2) The Supreme Court shall consider a question so referred and report its opinion on the question to the President. [emphasis applied]
3. The spirit and fundamental nature of the advisory jurisdiction under Article 186 accentuates that the President may refer any question of law which is considered to be a matter of public importance to the Supreme Court for its consideration and opinion. This function plays a momentous role in advisory jurisdiction. The foremost wisdom of this jurisdiction lies in enabling the President to seek aid and assistance in the form of an opinion from the Supreme Court on any issue of law concerning public importance, which is the dominant feature of the "Presidential Reference" encapsulated in the Constitution. In my view, while the opinion rendered under advisory jurisdiction may not be binding, it carries significant credence and persuasive value. It is rendered after much deliberation, thoughtfulness, and appreciation of the questions forwarded by the President consistent with the constitutional obligations and judicial propriety. Such opinions ought to be respected with due weight and esteem by all organs of the State. However, concomitantly, questions transmitted for opinion in the reference should not be ambiguous, indeterminate, or inexplicable to avoid the possibility of the Supreme Court returning the reference unanswered.
4. In essence, the scope and existence of advisory jurisdiction represent is a fundamental correlation and relationship between the government and the judiciary. It is the sole pathway for seeking Supreme Court's opinion in certain instances. The Court must remain confined to the proposed questions without making any departure and must keep a tight rein on the reference itself. The Supreme Court may decline to articulate an opinion if the questions framed lack any constitutional significance or public importance. In Reference No. 2 of 2005 (PLD 2005 SC 873), a nine-member bench of this Court rendered an opinion on the draft Bill titled "HISBA BILL". The opinion referenced various local and foreign judicial precedents and the insights of eminent jurists on constitutional provisions, and concluded that the opinion on a Presidential Reference is not a decision between parties but entails an extensive judicial exercise, including evaluation and appreciation of arguments advanced by advocates appearing for summoned parties, and the Court then forms an opinion. It was further expounded that keeping in mind the language used in Articles 189 and 190 of the Constitution, the opinion expressed by the Supreme Court on a Presidential Reference under Article 186 is required to be esteemed by all organs of the State. Thus, it would not be fair to say that the opinion expressed by the Supreme Court on a Presidential Reference under Article 186 of the Constitution has no binding effect.

II. Opinion of Larger Bench

5. On 06.03.2024, the larger bench of this Court delivered its opinion on five questions raised in the Reference filed by the President of Pakistan. The larger bench, by and large, opined that the proceedings of the trial by the Lahore High Court and the appellate judgment rendered by the Supreme Court did not meet the requirements of the fundamental right to a fair trial and due process, enshrined in Articles 4 and 9 of the Constitution, and later guaranteed as a separate and independent fundamental right under Article 10A of the Constitution. It was further opined that the Constitution and the law do not provide a mechanism to set aside the judgment whereby Mr. Bhutto was convicted and sentenced. The said judgment had attained finality after the dismissal of the review petition by this Court, and thus, this Court cannot reappraise the evidence to undo the decision.

6. No doubt, the conviction attained finality after the dismissal of the review petition by this Court. However, in my unfeigned empathy and astuteness, I reckon it my utmost duty to draw attention to the quintessential blemishes and glitches in the murder trial, which blatantly suppressed, devastated, and compromised the doctrine of due process of law and the right to a fair trial.

III. Overview of Murder Trial

7. To articulate my opinion, a selection of indispensable facts about the "Murder Trial" is sine qua non to be jotted down for augmentation. To avoid verbosity, I aim to recapitulate the short and snappy minutiae of the murder trial, which forms the nucleus of my opinion. Considering the acute topographies, FIR No.402/74 was registered on 11.11.1974 at Police Station Ichara, Lahore, on the complaint of Mr. Kasuri. After lodging the FIR regarding the assassination of his father, the police carried out the investigation but traced no culprits. Consequently, the investigation was transferred by the Senior Superintendent of Police to the Crime Investigation Agency. Despite the transfer, no suspects of the alleged crime were identified or implicated, and recommendations were made for closure. The report was submitted to the concerned Magistrate and approved vide administrative order dated 03.05.1976. Neither the complainant nor any other legal heirs of the deceased challenged the closure of the investigation in the High Court or applied to the prosecution agency for the revival of the case or changes to the investigation officer or agency. Here, the matter could have ended without any further proceedings or investigation, effectively setting it to rest for all practical purposes. However, on one fine morning, the Government of Punjab, of its own accord, appointed a Tribunal to inquire into the incident mentioned in the same FIR without any lawful justification or application from any aggrieved person.

IV. Reinvestigation in a Closed Case.

8. The erstwhile Tribunal, in its report dated 22.02.1975, issued certain directions for further investigation without any logical justification. After the imposition of martial law in the country, the Director of the Federal Investigation Agency ("FIA") resurrected the case on 03.05.1976, which had been closed much earlier. Again, this was done without any lawful justification and appeared to be an attempt to revive the closed case by any means with mala fide intentions. The Director of the FIA, more loyal than the king, implicated seven persons, including Mr. Bhutto. A final report under Section 173 of the Code of Criminal Procedure Code, 1898 ("Cr.P.C.") was submitted, wherein two accused persons were cited as approvers. The concerned Magistrate sent the matter to the Sessions Judge for trial on 12.09.1977. All of a sudden, a transfer application was moved by the State to the Acting Chief Justice of the Lahore High Court, who instantaneously transferred the case to the High Court for trial by 'a five-member bench headed by him. To conclude, the aforesaid bench, vide judgment dated 18.03.1978, awarded the death penalty to Mr. Bhutto. His appeal was dismissed by this Court on 06.02.1979, and though a review petition was filed, it was also dismissed on 24.03.1979. To end the story everlastingly, the death sentence was executed on 04.04.1979.

9. In the safe administration of the criminal justice system in our country, relevant provisions are provided under Cr.P.C. for making arrests, conducting investigations, holding trials, issuing convictions, and executing sentences. Whenever, an Officer In-Charge of a Police Station receives information about an offence, he is required to determine whether the offence is cognizable or non-cognizable. The Investigating Officer plays a crucial role in the administration of the criminal justice system and the constituent of the investigation report and its worth holds plenteous value and has repercussions on the outcome of any criminal case. The

Investigating Officer is obligated to investigate the matter from all possible angles, as required by Rule 25.2(3) of the Police Rules, 1934, to ascertain the truth and aim to arrest the real offender, not the innocents. The investigation typically begins with inspecting the crime scene, reconnoitering the circumstances connected to the offence, identifying and arresting the suspect, gathering of relevant evidence (including witness statements), making applications to the Court for recording confessions if any, conducting searches and seizures, carrying out recoveries and identification parades if required, and finally submitting the final report under Section 173, Cr.P.C., after fulfilling all legal requirements. The Investigating Officer must ensure that the provisions of the law are conscientiously followed without any breaches and the investigation is conducted impartially, with the sole aim of uncovering the truth rather than implicating innocents. This impartiality forms the foundational pathway for the prosecution's case. The mere registration of an FIR does not insinuate conviction or proof of guilt. Section 169, Cr.P.C., clearly provides that if, upon investigation, it appears to the Officer In-Charge of the police station, or to the Police Officer conducting the investigation that there is insufficient evidence or reasonable grounds for suspicion to justify forwarding the accused to a Magistrate, such officer shall, if such person is in custody, release the individual upon executing a bond, with or without sureties, as such officer may direct, to appear, if and when so required, before a Magistrate empowered to take cognizance of the offence on a police report and to try the accused or send him for trial. The case of *Norwest Holst Ltd. v. Department of Trade and others* [(1978) 3 All ER 280 at 290] held that "in every investigation, there are by and large three different phases. First of all, the administrative phase; next, the judicial phase; and, finally, the executive phase when the orders of the Court or the Tribunal are, if necessary, executed, or promulgated. Quite plainly fairness to the suspect demands that he should be given a chance of stating his case. Equally fairness demands that the suspect shall be given a chance of putting his side of the case before the judicial inquiry is over. Fairness to the inquirer demands that during the administrative period he should be able to investigate without having at every stage to inquire from the suspect what his side of the matter may be. Of course, it may be difficult to find out the particular point at which the administrative phase ends and the judicial phase begins". The judgment also quoted a passage from Lord Reid's speech in *Wiseman v. Borneman* [(1971) AC 297, at 308]), that every public officer deciding whether to prosecute or raise proceedings ought to first decide whether a *prima facie* case is made out or not.

10. Neither does it appear from the record that anyone, including the legal heirs of the deceased, was dissatisfied with the first investigation into the alleged crime, nor is there any indication that they approached the police, the FIA, or the High Court to request a fresh investigation. Additionally, nothing in the record justifies the decision to reinvestigate a closed case. No independent reasoning appears to have been applied to explain why reinvestigation was necessary. Moreover, there is no mention of significant errors or blunders made by the original Investigating Officer, nor any suggestion that evidence was intentionally omitted or manipulated to favour the accused. Similarly, there is no indication that overwhelming evidence was ignored or that reinvestigation was necessary to unearth the truth because the earlier investigation was so defective or contained such visible and seeming lapses on part of the Investigating Officer that it was rendered inadequate. Even the directions in the Tribunal's order to the investigating agency do not reflect any concrete or strong justification for reinvestigation. Instead, reinvestigation was ordered mechanically without identifying lapses on the part of the Investigating Officer. Neither was it asserted that the earlier investigation was botched, nor was any departmental action proposed against the Investigating Officer if the Tribunal believed that he failed to discharge his statutory duty of conducting a fair and impartial investigation.

11. The 'purpose of reinvestigation is not to appease influential individuals or to implicate the innocent. Its underlying principle is to unearth the truth where fairness, rectitude, and impartiality demand it. However, this does not mean that reinvestigation should routinely or customarily be ordered *de novo*, after submission of challan/report of closure, without any rational or well-articulated justification. Such orders must not cater to grudges or nefarious designs aimed at dragging the irreproachable or innocent individuals into dire consequences. Reinvestigation cannot be wielded as a tool to favour any influential persons or punish the innocent so casually, callously, or arbitrarily, at the whims of influential and powerful individuals.

Manipulated or misused, the garb of reinvestigation is truly a dangerous idea that undermines the integrity of the criminal justice system and poses a serious danger to its administration.

V. Transfer of Case from Sessions Court to High Court

12. According to Section 28 of the Cr.P.C., an offence under the Pakistan Penal Code, 1860 (P.P.C.) may be tried by the High Court, or by the Court of Session or by any other Court by which such offence is shown in the eighth column of the Second Schedule to be triable. Section 31, P.P.C., however, is noteworthy, according to which the High Court may pass any sentences authorised by law. Similarly, a Sessions Judge or Additional Sessions Judge may pass any sentence authorised by law, with the rider that any sentence of death passed by any such Judge shall be subject to confirmation by the High Court. While Section 302 offences are triable by Sessions Court, as also mentioned in the Schedule-II (Explanatory Note) of the Cr.P.C., as the procedural framework outlined in Section 190, Cr.P.C., states that the Magistrate may take cognizance of any offence upon receiving a complaint of facts which constitute such offence; upon a report in writing of such facts made by any police officer; upon information received from any person other than a police officer, or upon his own knowledge or suspicion, that such offence has been committed which he may try or send to the Court of Session for trial. A Magistrate taking cognizance of an offence triable exclusively by a Court of Session shall, without recording any evidence, send the case to the Court of Session for trial under Section 193, Cr.P.C., wherein it is clearly provided that except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a Court of original jurisdiction, unless the case has been sent to it under Section 190.

13. The factual matrix in the case decrypts that the case was sent for trial to the Sessions Judge, Lahore, on 12.09.1977. However, on the very next day, a transfer application was filed by the State, which was allowed on the same day by the Acting Chief Justice of the Lahore High Court, the late Justice Maulvi Mushtaq Hussain, who constituted the bench, and the charge was framed on 11.10.1977. Without a doubt, under Section 526 Cr.P.C., the High Court has jurisdiction to transfer a case or itself try it, but with certain conditionalities, for instance: (a) that a fair and impartial inquiry or trial cannot be had in any criminal court subordinate thereto; (b) that a question of law of unusual difficulty is likely to arise; (c) that a view of the place in or near which any offence has been committed may be required for a satisfactory inquiry into a trial of the same; (d) that an order under this section will tend to the general convenience of the parties or witnesses; or, (e) that such an order is expedient for the ends of justice, or is required by any provision of this Code. While exercising this jurisdiction,, the High Court may act either on the report of the lower court, or on the application of a party interested, or on its own initiative.

14. It appears beyond any doubt that J. Maulvi Mushtaq Hussain allowed the transfer application in a slipshod manner, even without notice to the accused persons. Neither did the Court consider the parameters and constituents of Section 526, Cr.P.C., which require consideration before passing an order of transfer of a case, nor did it record in the order how Mr. Bhutto, who was incarcerated and no longer in power, was in a position to influence or manipulate the outcome, or hinder a fair inquiry or trial. Moreover, it was not mentioned what serious question of law of unusual difficulty was likely to arise in the prosecution case, or how the transfer was required for the general convenience of the parties or witnesses, or expedient for the ends of justice. On the contrary, in my view, the order was tainted with malice, seemingly intended 'to gain control of the prosecution case to stifle or curb the ends of justice and the right to a fair trial which is an inherent and fundamental right of every accused. The Court should not have rubberstamped the State's request for a case transfer without notice to the accused or without judiciously, cautiously, and diligently addressing the grounds raised in the transfer application to determine whether it genuinely made out a case for transfer or if the purpose of the transfer was to cause serious prejudice to the defence. It is evident from the record that Mr. Bhutto not only challenged the transfer order but also objected to the five-member bench trying the case, particularly alleging bias against J. Maulvi Mushtaq Hussain, who was heading the bench. However, all such objections were in vain. Neither the bench members of the High Court ever acknowledged these concerns, nor did this Court give any importance

or paid any heed to them. Despite serious objections, J. Maulvi Mushtaq Hussain did not recuse himself from the bench, but continued enthusiastically completing the murder trial.

VI. Allegations of Bias

15. Now, I would like to address the allegations of bias. Various instances are reflected in the record, including altercations and sarcastic remarks from the bench during the trial, which led Mr. Bhutto to believe he could not expect a fair trial or justice. Time and again, he raised allegations of bias and expressed lack of confidence, but the bench, seemingly overenthusiastic, overzealous, or under external pressure, continued the trial. They awarded the maximum sentence based solely on the testimony of an approver, without any other concrete incriminating or corroborative testament or circumstantial evidence. The bench's approach was unique and, even without considering any mitigating circumstances, appeared predetermined or prejudiced to impose the maximum punishment in a highly dubious case. In my considered view, the personal bias or preconceived notions of the judges unambiguously rendered them incapable of serving independently and fair-mindedly, which undermines the basic limb of the administration of justice and the sacred trust of the masses. When there is an actual probability of bias, the judge ought to recuse themselves, not because they are necessarily biased or incapable of dispensing justice impartially, but because the circumstances might engender a certain restlessness or fear of bias influencing the outcome of a case in the mind of others. In fact, reposing public confidence in the judiciary is the yardstick by which the justice delivery system and its integrity are appraised, including adherence to the doctrine of *ex debito justitiae*. A biased decision inevitably undermines credibility. However, mere apprehension or allegations of bias without any substantial whys and wherefores cannot alone justify recusal. Each judge, guided by his own conscience and sense of right and wrong, must decide whether to sit in a particular case or not. Lord Hewart's aphorism in *Rex v. Sussex Justices* ([1924] 1 KB 256) aptly applies here: "Justice must not only be done, but must also be seen to be done". Relevant local and foreign judicial precedents which are essentially concentrated on the question of alleging bias are as follows:-

1. *Ms. Benazir Bhutto v. The President of Pakistan* (1992 SCMR 140). Bias in a Judge is the paralysis, complete or partial, of judicial faculties and therefore the allegation of bias against a Judge would be wholly unfounded unless it be shown that the proceedings held by him were irregular and one-sided or the conclusions reached by him were wrong and reasons given in support thereof erroneous. Bias in judicial matters may be caused by the judgment, order or observations of a Superior Court or it may spring from personal, political, religious, communal, racial, commercial or economic considerations. Ref: *Dimes v. The Grand Junction Canal (No.1) and others* (1852) H.L.C. 759-794 and *Rex v. Sussex Justices* (1924) 1 K B 256 and *Muhammad Ismail Chowdhury v. Abdul Khaleque Dowdagar and another* (PLD 1960 SC (Pak.) 301.

2. *Islamic Republic of Pakistan v. Abdul Wali Khan* (PLD 1976 SC 57). Mere suspicion of bias, even if it is not unreasonable, is not sufficient to disqualify a Judge. The basis of the disqualification, therefore, is "personal bias or prejudice" of such a nature as would necessarily render a Judge unable to exercise his functions impartially in a particular case and this must be shown as a matter of fact and not merely as a matter of opinion.

3. *President v. Shaukat Ali* (PLD 1971 SC 585), The mere assertion of bias can never be sufficient to disqualify a Judge in hearing a cause or matter. In the absence of any pecuniary or proprietary interest in the subject-matter of the proceeding, it is essential that a real likelihood of bias must be shown.

4. *Government of NWFP v. Dr. Hussain Ahmed Haroon* (2003 SCMR 104). It is an age-old fundamental principle of law that justice should not only be done but manifestly and undoubtedly it should be seen to have been done. To achieve this objective/
goal it is of prime importance that a Judge/person equipped with the authority of decision should not be having any sort of personal interest in the outcome of the matter under issue before him. The conduct of the proceedings should not

generate any reasonable apprehension in the mind of a person that the deciding officer has harboured any grudge or bias against him.

5. *Asif Ali Zardari v. The State* (PLD 2001 SC 568). The foremost question is what is 'bias' has been described in *Corpus Juris Secundum*, Volume X pp. 354 and 355. BIAS. Primarily, a diagonal or slant, especially of a seam, cut, or line across a fabric; and so derivatively, a leaning of the mind; a mental predilection or prejudice; anything which turns a man to a particular course; a particular influential power which sways the judgment; a preconceived opinion; a sort of emotion constituting untrustworthy partiality; bent, inclination, prepossession, propension, or tendency, which sways the? mind toward one opinion rather than another; propensity toward an object, not leaving the mind? indifferent. "Bias" has been held synonymous with "partiality," and strictly to be distinguished from "prejudice". Garner on Administrative Law, 4th Edition at page 122 has also attempted to define bias as a disqualification and in such context observed as follows: "Not only is a person affected by an administrative decision entitled to have his case heard by the agency seized with its determination, but he may also insist on his case being heard by a fair Judge, one free from bias. Bias in this context has usually meant that the adjudicator must have no financial interest in the matter under dispute, but it is not necessarily so limited, and allegations of bias have been upheld in circumstances where there was no question of any financial interest."

6. *State of Punjab v. Davinder Pal Singh Bhullar* (AIR 2012 SC 364). In respect of judicial bias, the statement made by Frank J. of the United States is worth quoting: "If, however, bias' and partiality' be defined to mean the total absence of preconceptions in the mind of the Judge, then no one has ever had a fair trial and no one will. The human mind, even at infancy, is no blank piece of paper. We are born with predispositions..... Much harm is done by the myth that, merely by..... taking the oath of office as a judge, a man ceases to be human and strips himself of all predilections, becomes a passionless thinking machine." The principle in these cases is derived from the legal maxim *nemo debet esse judex in causa propria sua*. It applies only when the interest attributed is such as to render the case his own cause. This principle is required to be observed by all judicial and quasi-judicial authorities as non-observance thereof, is treated as a violation of the principles of natural justice. (Vide: *Rameshwar Bhartia v. The State of Assam*, AIR 1952 SC 405; *Mineral Development Ltd. v. The State of Bihar* and another AIR 1960 SC 468; *Meenglas Tea Estate v. The Workmen*, AIR 1963 SC 1719; and *The Secretary to the Government, Transport Department, Madras v. Munuswamy Mudaliar and others* AIR 1988 SC 2232).

7. *Gullavalli Negeswararao etc. v. The State of Andhra Pradesh and others* (AIR 1959 SC 1376). It is one of the fundamental principles of judicial procedure that the person or persons who are entrusted with the duty of hearing a case judicially should be those who have no personal bias in the matter. In *Ranger v. Great Western Ry. Co.*(1) Lord Cranworth, L.C., says: 'A judge ought to be, and is supposed to be, indifferent between the parties. He has, or is supposed to have, no bias inducing him to lean to the one side rather than to the other In ordinary cases it is just ground of exception to a judge that he is not indifferent, and the fact that he is himself a party, or interested as a party, affords the strongest proof that he cannot be indifferent."

8. *Ranjit Thakur v. Union of India and others* (AIR 1987 SC 2386). The test of real likelihood of bias is whether a reasonable person, in possession of relevant information, would have thought that bias was likely and is whether respondent was likely to be disposed to decide the matter only in a particular way. It is the essence of a judgment that it is made after due observance of the judicial process; that the Court or Tribunal passing it observes, at least the minimal requirements of natural justice, is composed of impartial persons acting fairly and without bias and in good faith. A judgment which is the result of bias or want of impartiality is a nullity and the trial "coram non-judice."

9. *Bhajan Lal, Chief Minister, Haryana v. Messrs Jindal Strips Ltd. and others* (1994) 6 SCC 19. Bias is the second limb of natural justice. Prima facie no one should be a judge in what is to be regarded as 'sua causa', whether or not he is named as a party. The decision-maker should have no interest by way of gain or detriment in the outcome of a proceeding. Interest may take many forms. It may be direct, it may be indirect,

it may arise from a personal relationship or from a relationship with the subject-matter, from a close relationship or from a tenuous one.

10. Justice P.D. Dinakaran v. Hon'ble Judges Inquiry Committee (2011) 8 SCC 380. *Nemo debet esse judex in propria causa*. This principle consists of the rule against bias or interest and is based on three maxims: (i) No man shall be a judge in his own cause; (ii) Justice should not only be done, but manifestly and undoubtedly be seen to be done; and (iii) Judges, like Caesar's wife should be above suspicion. The first requirement of natural justice is that the Judge should be impartial and neutral and must be free from bias... He must be in a position to act judicially and to decide the matter objectively. A Judge must be of sterner stuff. His mental equipoise must always remain firm and undetected. He should not allow his personal prejudice to go into the decision-making.

11. A.K. Kraipak v. Union of India (AIR 1970 SC 150). The real question is not whether he was biased. It is difficult to prove the state of mind of a person. Therefore what we have to see is whether there is reasonable ground for believing that he was likely to have been biased. We agree with the learned Attorney General that a mere suspicion of bias is not sufficient. There must be a reasonable likelihood of bias. In deciding the question of bias we have to take into consideration human probabilities and ordinary course of human conduct.

12. Davidson v. Scottish Ministers [2004] UKHL 34 [House of Lords]. In Porter v Magill [2001] UKHL 67, [2002] 2 AC 357, 494, paragraph 103, my noble and learned friend Lord Hope of Craighead expressed the test in terms accepted by the Second Division and by both parties to this appeal- "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

13. Webb & Hay v. R [1993] HCA 30 [High Court of Australia]. When it is alleged that a judge has been or might be actuated by bias, this Court has held that the proper test is whether the fair-minded people might reasonably apprehend or suspect that the judge has prejudged or might prejudice the case. In considering the merits of the test to be applied in a case where a juror is alleged to be biased, it is important to keep in mind that the appearance as well as the fact of impartiality is necessary to retain confidence in the administration of justice. Both the parties to the case and the general public must be satisfied that justice has not only been done but that it has been seen to be done.

14. R v. Sussex Justices, ex parte McCarthy [1923] All ER 233 [House of Lords]. It was of fundamental importance that justice should not only be done, but that it should also be manifestly seen to be done; the question was not whether the acting clerk, when with the justices, made any observation or offered any criticism which he could not properly make or offer, but whether he was so related to the case by reason of the civil action as to be unfit to act for the justices in the criminal proceedings, and the answer to that question depended, not on what was actually done, but on what might appear to be done; what he did might have created a suspicion that there had been an improper interference with the course of justice; and, therefore, the conviction of the applicant must be quashed.

15. R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 2) [1999] 1 All ER 577 [House of Lords]. The contention is that there was a real danger or reasonable apprehension or suspicion that Lord Hoffmann might have been biased, that is to say it is alleged that there is an appearance of bias not actual bias. The fundamental principle is that a man may not be a judge in his own cause. This principle, as developed by the courts, has two very similar but not identical implications. First it may be applied literally: if a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he is indeed sitting as a judge in his own cause. In that case, the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second application of the principle is where a judge is not a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial, for example because of his friendship with a party. This second type of case is not strictly speaking an application of the principle that a man must not be judge in his own cause, since the judge will not normally be himself benefiting, but providing a benefit for another by failing to be impartial.

16. Taylor and another v. Lawrence and another [2002] EWCA Civ 90 [Court of Appeal, Civil Division]. For the purpose of applying the test for apparent bias, namely whether in the all the circumstances a fair-minded and informed observer would be led to conclude that there was a real possibility that the tribunal was biased, the informed observer could be expected to be aware of the legal traditions and culture of the English jurisdiction, and accordingly he would be aware that in the ordinary way contacts between the judiciary and the legal profession should not be regarded as giving rise to a possibility of bias.

VII. Doctrine of Natural Justice and Due Process of Law

16. In our history, it was not rare but rather the first murder trial conducted by the High Court, which was unique in that it was decided by a bench of five likeminded judges, including the then Acting Chief Justice, who unanimously agreed to award the death penalty. I am also mindful of the turn of phrase, "the accused is the favourite child of law". The substratum of this concept is based on the farsightedness and prudence that it is better to let a hundred guilty persons be acquitted than to convict one innocent or that it is better to run the risk of sparing the guilty than to condemn the innocent. Reliance is placed on the principles elucidated in my judgment, Muhammad Riaz v. Khurram Shehzad (2024 SCMR 51). The *raison detre* is to assess and scrutinize whether the police and prosecution have performed their tasks accurately and diligently in apprehending and exposing the actual culprits or whether they dragged innocent persons into the crime due to a defective or botched-up investigation, depriving the victim of justice. The philosophy of this phrase, though, does not imply that the Court should grant any unwarranted favours, indulgences, or preferential treatment to the accused. Rather, it ensures a fair-minded and unbiased sense of justice in all circumstances, as a safety gauge to maintain an evenhanded right of defence and a fair trial, thereby complying with the due process of law and reinforcing the renowned doctrine, "innocent until proven guilty". However, if the prosecution case's background or chronicle is analyzed, it strongly suggests that Mr. Bhutto was not treated as the "favorite child of law" but rather as an "unfavourite child of law".

17. The personal bias, prejudice mind or jaundiced eye of the judges tarnished and contaminated the framework of entire trial and the judgment, which tantamount to grave violation of the principle of natural justice and it also enfeebles the elementary foundation of the administration of justice which is sacrosanct for the faith and conviction of the masses. To enjoy the protection of law and to be treated in accordance with the law is the inalienable right of every citizen. The purpose of Article 4 of the Constitution, is to ascribe and integrate the doctrine of equality before the law or equal protection of the law. No action detrimental to the life and liberty of any person can be taken without due process of law. The principles of natural justice require that the delinquent be afforded a fair opportunity to converge, explain, and contest before being found guilty or condemned without any bias or prejudice of the Courts and judges. The principles of natural justice and the doctrine of due process are not new phenomena but have long been encapsulated as a sacred obligation of every court and tribunal to follow religiously in all matters, whether civil or criminal, to ensure a fair trial. The right to a fair trial has now been explicitly enshrined in our Constitution by virtue of the 18th Constitutional Amendment in the shape of Article 10-A and in case of apparent bias as done in this case, the accused could not expect right to fair trial. [Reference can be made to some judgments authored by me, such as Junaid Wazir v. Superintendent of Police (2024 SCMR 181), Federation of Pakistan v. Zahid Malik (2023 SCMR 603), Usman Ghani v. The Chief Post Master, GPO Karachi (2022 SCMR 745), Capital Development Authority v. Shabir Hussain (2022 SCMR 627), Raja Muhammad Shahid v. The Inspector General of Police (2023 SCMR 1135), Muhammad Yaseen v. Province of Sindh (2024 PLC(C.S.) 111), Government of Balochistan v. Ghulam Rasool (2024 SCMR 1155) and Inspector General of Police, Quetta v. Fida Muhammad (2022 SCMR 1583).

VIII. Evidence of the Approver

18. I cannot ignore another crucial aspect, which is an acid test for considering and appreciating the evidence of an approver: whether their testimony is trustworthy or not. To ensure the safe, effective, and efficient administration of the criminal justice system, certain norms and yardstick are to be followed. The Court must first be satisfied that the testimony of the approver has been adequately corroborated to avoid a conviction based on weak or tainted evidence. Each case has its own facts. No doubt, an approver may be a competent

witness, but their evidence requires substantial corroboration regarding the crime, the identity of each accused, and corroboration through independent and reliable evidence. The settled rule of practice is not to convict any accused on the basis of any vicious or venomous investigation. Therefore, the evidence of an approver must be appreciated with great care and caution and not treated as gospel truth. It would not be incongruous to emphasize here that under Section 114 of the Evidence Act, 1872, which is analogous to Article 129 of the Qanun-e-Shahadat Order, 1984, the Court may presume the existence of any fact it considers likely to have happened, having regard to the common course of natural events, human conduct, and public and private business in their relation to the facts of the particular case. However, the illustration provided in clause (b) distinctly conveys "that an accomplice is unworthy of credit, unless he is corroborated in material particulars", an important factor that was also not considered when giving credence to the evidence of the approver.

IX. Confirmation of Death Sentence

19. If the death sentence is awarded to an accused by the Court of Session, the proceedings must be submitted to the High Court under Section 374, Cr.P.C., and the sentence cannot be executed unless confirmed by the High Court. Under Section 376, Cr.P.C., when a murder reference is submitted by the Court of Session under Section 374, the High Court may confirm the sentence, or pass any other sentence warranted by law, or may annul the conviction, and convict the accused of any offence of which the Sessions Court might have convicted him, or order a new trial on the same or an amended charge, or may acquit the accused person, provided that no order of confirmation shall be made until the period allowed for preferring an appeal has expired, or, if an appeal is presented within such period, until such appeal is disposed of. For all intent and purposes, one thing is clear beyond any shadow of doubt: confirmation of a death sentence by the High Court is only required if the punishment is awarded by the Court of Session and a murder reference is submitted to comply with the letter of law. However, in this case, the death penalty was awarded by a five-member bench of the High Court, so there was no need for confirmation by any lower, or similar, or even larger bench of the same High Court. According to the exactitudes of Section 374, Cr.P.C., a murder reference may be sent by the Court of Session for confirmation, and the role of the High Court as provided under Section 376 Cr.P.C. cannot be read in isolation. It is contingent upon the murder reference sent by the Court of Session for confirmation under Section 374, Cr.P.C. Since the murder trial was conducted by the High Court itself, which was undoubtedly a rare example, no further confirmation was required upon conviction by the High Court, in accordance with the provisions of Section 376, Cr.P.C.

X. Right of Appeal

20. Had the murder trial been conducted by the Court of Session and the death penalty awarded, Mr. Bhutto could have appealed before a divisional bench of the Lahore High Court. However, since the trial was conducted by the High Court itself, his right to appeal in the High Court was forfeited. To address such situations, the framers of the Constitution wisely provided for a direct appeal to the Supreme Court under sub-article (2) (b) of Article 185 of the Constitution in cases where the High Court withdraws a case for trial before itself from a subordinate court and convicts the accused. Likewise, the prerequisites of the appellate jurisdiction of the Supreme Court are further delineated in the sub-article (3) of Article 185, which states that an appeal to the Supreme Court from a judgment decree, order, or sentence of a High Court in a case to which clause (2) does not apply shall lie only if the Supreme Court grants leave to appeal. What normally happens? When the death penalty awarded by the Court of Session is confirmed by the High Court in a murder reference and the appeal of the convict is dismissed by the High Court while maintaining the judgment awarding the death penalty, the Supreme Court, in order to ensure the safe administration of justice, typically grants leave to appeal and provides ample opportunity for hearing in order to reevaluate and revisit whether the death penalty is rightly awarded or not. However, in the case of Mr. Bhutto, due to the direct appeal being preferred in the Supreme Court, at least one sure-shot expected right of appeal with the leave of this Court was lost, and the solitary remedy or opportunity that remained in the playing field was to move a review petition alone after dismissal of Appeal by this Court.

XI. Interviews in Print and Electronic Media

21. Last but not least, the reference sent by the President of Pakistan is also structured and unfolded in paragraph 9, where the late Justice Nasim Hasan Shah, former Chief Justice of Pakistan, in his interviews on print and electronic media, admitted that the decision regarding Mr. Bhutto's appeal was made under coercion. This admission leaves no doubt in the mind of a sane and prudent person that it was a judicial murder and such admission constitutes a violation of his oath. According to the chronicles, J. Nasim Hasan Shah was appointed as an Ad Hoc Judge of the Supreme Court on 18.05.1977. The Lahore High Court delivered its judgment against Mr. Bhutto on 18.03.1978; the Supreme Court decided his appeal on 06.02.1979; the review petition was dismissed on 24.03.1979; and to close the chapter, the death penalty was executed on 04.04.1979. J. Nasim Hasan Shah retired on 14.04.1994, but was first interviewed by journalist Mr. Suhail Warraich in 1996, which interview was published in Jang Magazine. Another journalist/host, Mr. Iftikhar Ahmed, interviewed him on 03.12.2003 for his TV show, aired on Geo TV Network. After laying down the robes of his office, his conscience awakened and forced him to make disclosures through print and electronic media. In both interviews, J. Nasim Hasan Shah revealed his own views and some other relevant facts. Though he retired in April 1994, he made certain revelations years later that added fuel to the fire and were also incorporated in the Presidential Reference as eye-openers. The remorse, confession, or admission of wrongness in the decision came much after the die was cast. It is quite a common phenomenon that poetry or its verses have multiple meanings, interpretations, or even double entendres, but quite fitting for the belated disclosures made in the interview under discussion, I wish to dedicate the following rhymes of the famous poet Dagh Dehlvi, which seems to match the situation:

22. According to the manuscript and DVD produced in Court during the hearing of this Reference, J. Nasim Hasan Shah expressed regret over the decision and admitted that Mr. Bhutto's punishment could have been reduced. He also revealed that some of the judges were under external pressure. J. Nasim Hasan Shah confessed in an interview with Iftikhar Ahmed, televised on Geo TV's programme "Jawab De". According to the gist of the interview, J. Nasim Hasan Shah stated that it was J. Maulvi Mushtaq Hussain's unjustness (zyaadati), as he was a very strong person and an enemy of Mr. Bhutto. He said that it would have been better if he had not been on the case. When the host asked if he still could have written a dissenting note, J. Nasim Hasan Shah replied in the affirmative, but explained that there was some weakness on his part as well as on the part of Mr. Bhutto's chief defense attorney, Mr. Yahya Bakhtiar, as the latter had somewhat annoyed the judges. The host further pointed out that while Mr. Yahya Bakhtiar might have annoyed the judges, J. Nasim Hasan Shah himself admitted that Mr. Bhutto should have received the benefit of doubt. J. Nasim Hasan Shah again responded in the affirmative. The host then asked if Pakistan's history would have been different today had he written a dissenting note, to which J. Nasim Hasan Shah responded that he does not know if it would have been different, but at least Mr. Bhutto's life might have been spared. He expressed regret about the situation, noting that Mr. Yahya Bakhtiar seemed unwilling to argue against the sentence or mitigating circumstances. Mr. Nasim Hasan Shah said that, as a human, a certain level of detachment occurs, but the role of the lawyer is to win the judge's favor, and in this case, the counsel had annoyed the judges. The disclosures made in the interview, though belated, not only blew the whistle on the biases involved but also pierced the veil of the entire trial and conviction, exposing blatant violations of fair trial principles with the complicity of the judges conducting the trial.

XII. Mitigating Circumstances

23. A judge is not supposed to be influenced by appeasement or flattery, nor should they harbor malice or venom against any party while discharging their sacred duty of imparting justice in accordance with the law. The conversion of a death penalty into life imprisonment does not equate to a clean chit for the convict; the punishment remains intact, albeit with a modified quantum. It is astonishing that, according to aforementioned interview excerpt, the judges of this Court, while hearing the appeal of Mr. Bhutto, were anxiously waiting for arguments on the quantum of sentence but felt annoyed by the counsel for the appellant. The tolerance and forbearance of judges must not be so fragile or touchy as to make them easily annoyed during the hearing of a case, which is a sacred duty and trust. If a judge becomes annoyed with a litigant or their advocate in an unruly manner and loses their patience, control, or peace of mind, it becomes difficult for them to impart justice in accordance with the law. Therefore, judges should remain calm, be good listeners, and instead of arguing themselves, which is the core function of lawyers, they must allow lawyers the opportunity to present their cases and arguments. According to the details of the interview, the judges hearing the appeal were annoyed, and if this was so, then of course, the possibility of an independent application of mind was remote. Decisions made in haste or anger are not only contrary to the basic norms of justice under the law of the land, but also violate the standards set forth in the injunctions of Islam for the administration of justice. Normally, in appeals filed before the Supreme Court in cases where the High Court has confirmed the death penalty, this Court, in order to ensure the safe administration of justice, not only grants leave but, at times, considers mitigating 'circumstances, altering the punishment without specific arguments. Sometimes, the Court even hints at this line of argument.

24. In the judgment of the Review Petition *Zulfikar Ali Bhutto v. The State* (PLD 1979 Supreme Court 741), this Court recorded submissions by Mr. Yahya Bakhtiar that, even if the petitioner's conviction were maintained, it was a fit case for the lesser penalty under Section 302 of the P.P.C., read with Sections 109 and 111, as the petitioner was guilty only of abetment and was not present at the scene of the murder. However, these arguments were conveniently set aside on the ground that they had not been raised during the hearing of the appeal. It was further articulated in the judgment of the review petition that during the hearing of the appeal the question of sentence was very much present before the Court, and it was the duty of the learned counsel for the petitioner to raise such points during that time, but the counsel was more focused on seeking acquittal than pleading for mitigation of the sentence.

25. In my opinion, almost in all cases where appeals are filed against confirmation of the death penalty, no advocate directly requests a conversion of the sentence to life imprisonment. Instead, they strive for a fair acquittal for their client, which is the professional duty of every lawyer. Simultaneously, the appellate Court, with its sense of right and wrong, always has inherent jurisdiction to affirm, set aside, or modify sentences. Even when dismissing an appeal and maintaining a conviction, the Court may alter or convert the sentence from death to life, or to a lesser punishment, to do complete justice, particularly when the punishment does not seem commensurate with the gravity of the charge, the role attributed to the convict, or in cases of doubt that a maximum punishment may not be justified. Despite the established bias and grave violations of natural justice and due process in the trial and conviction, the punishment in this case was maintained. The matter did not end here, but the Court also missed the train and failed to consider mitigating circumstances, despite overwhelming material on record which could have justified an acquittal or, at the very least, a conversion of the death penalty to life imprisonment. This omission was quite tragic, atrocious, and reprehensible.

26. Though this Court rendered its opinion on 06.03.2024, almost after 13 years, it may be said, better late than never. In my view, there was no plausible justification to delay the opinion on the Presidential Reference. I am at a loss as to why it was preserved in cold storage, left hanging, and why the hearing was not commenced immediately when the questions were framed by the respected bench of this Court. Anyhow, . It is an essential limb of civil and criminal administration of justice that "justice delayed is justice denied," which virtually means that cases, whatever they may be, should not be delayed or protracted indefinitely. Courts should decide matters within a reasonable period of time, as unjustified delays can emasculate fairness and render justice inconsequential or of little worth to the parties involved. On the other hand, another maxim, "justice hurried is justice buried," also has far-reaching implications, accentuating that undue haste or a

compromise on natural justice and due process may also prejudice the rights of the parties. In such situations, the possibility of injustice cannot be ruled out. The best course to avoid the adverse consequences of both the aforesaid legal aphorisms is to maintain a proper balance in the court docket, with a measured pace. More importantly, cases should not be delayed purposefully due to their profile or significance, as happened with this Reference, which awaited its long-pending turn for an opinion.

XIII. Doctrine of repentance

27. Another important factor that cannot be overlooked is that Question No. 4 of the Presidential Reference framed by this Court had a direct nexus with the doctrine of repentance. For ease of reference, it is reproduced as under: -

"Whether the decision in the case of murder trial against Shaheed Zulfiqar Ali Bhutto fulfills the requirements of Islamic laws as codified in the Holy Quran and the Sunnah of the Holy Prophet (SAW)? If so, whether present case is covered by doctrine of repentance specifically mentioned in the following Suras of Holy Quran:

(a) Sura Al-Nisa: verses 17 and 18 Sura Al-Baqara: verses 159, 160 and 222 Sura Al-Maida: verse 39 Sura Al-Aaraaf: verse 153 Sura Al-Nehal verse 119 Sura Al-Taha: verse 82 as well as (b) Sunan Ibn-e-Maaja, Chapter 171, Hadith No. 395.

What are effects and consequences of doctrine Re: Repentance"

28. No opinion was rendered by this Court on Question No. 4, which was left unanswered for the valid reason that no assistance was provided on this question. Since this question on the doctrine of repentance was framed with reference to various verses of the Holy Quran, forming a substantial segment of the Presidential Reference, I feel it should not remain untouched or unanswered. Repentance is expressed in Arabic as "taubah," which is a fundamental precept of the teachings of Islam. It involves the confession of sins, remorse for past wrongdoings, and a pledge to refrain from them in the future. Islam prescribes that repentance entails giving up the sin immediately, regretting what happened in the past, resolving not to go back to sinning, restoring others' rights or property, and repenting before the agony of death [Ref: [https://islamaa.info/en/answers/14289/how-to-repent-in-islam#:.](https://islamaa.info/en/answers/14289/how-to-repent-in-islam#:)]. One of the wisdoms of repentance is that the believer experiences real regret and turns to Allah without wasting any time and strives not to repeat that mistake. Therefore, he repents in a true and sincere manner. He repents and keeps his word that he will remain on the right path until the end of his life [Ref: <https://www.arabnews.pk/islam-perspective/news/841561>]. Allama Ibn al-Shami, a renowned jurist, stated that Muslims should emulate the Prophet's example by following his teachings, and should not try hard to find wrongdoings. We must also strive to protect the excellent reputation of the Last Messenger of Almighty Allah and abide by what he did, accepting the repentance of one who repents. As he emphasized, "it is not for us to impose punishments and other means of deterrence on the basis of our personal inclinations. Rather, we are bound to act on what appears to be the law of our Prophet (peace and blessings of Allah be upon him)" [Ref: Zubair Saeed Sabri v. The State (PLD 2024 SC 681)].

29. The unresolved question in my introspection is why the question regarding the doctrine of repentance was framed by this Court? Who had to or has to repent for the unfair and biased trial? Was it the departed souls who tried the case in the High Court? Those who heard the appeal and review? The bench that entertained and framed the question? Or the bench members who rendered their opinion years after the Reference was instituted? This Court unanimously noted various lapses and biases in the High Court's murder trial, ultimately concluding that the proceedings of the trial by the Lahore High Court and the appeal by the Supreme Court failed to meet the constitutional requirements of a fair trial and due process enshrined in Articles 4, 9, and later guaranteed as a separate and independent fundamental right under Article 10A of the Constitution. In my view, not only it demonstrates some sought of remorse though not explicitly articulated but it also implies a recognition of repentance for the failure to ensure a fair trial and due process, even as Question No. 4 of the Presidential Reference remains unanswered or undecided.

30. I wrap up this opinion with the poignant verses of Mirza Ghalib (Mirza Asadullah Baig khan):

31. The office is directed to report this opinion through proper channel to the worthy President of Pakistan in terms of Article 186 of the Constitution of the Islamic Republic of Pakistan, 1973.

MWA/R-8/SC

Reference answered.

¹ In its meeting held on 28 March 2011.

² On 1 April 2011, pursuant to entry 54 of Schedule V-B, Rule 15-A(1) of the Rules of Business, 1973 (enacted under Articles 90 and 99 of the Constitution of the Islamic Republic of Pakistan.

³ On 2 April 2011.

⁴ Before a three-Member Bench, comprising of Iftikhar Muhammad Chaudhry, CJ, Muhammad Sair Ali, J and Ghulam Rabbani, J.

⁵ (1) Reference No. 1 of 2012 filed on 7 December 2012, (2) Reference No. 1 of 2020 filed on 23 December 2020, (3) Reference No. 1 of 2022 filed on 21 March 2022 and (4) Reference No. 2 of 2022 filed on 18 October 2022.

⁶ <https://www.youtube.com/live/fnsKtflYm78?si=Wnye57ErIJ39zB0>.

⁷ Notification No.SOG-III-6-309/74, dated 13 November 1974, published in the Punjab Gazette on 11 December 1974.

⁸ State v. Zulfiqar Ali Bhutto PLD 1978 Lahore 523.

⁹ Zulfiqar Ali Bhutto v. State, PLD 1979 Supreme Court 53, p. 61, para 9.

¹⁰ In re: Reference No. 1 of 2011, 2011 SCMR 962.

¹¹ Zulfiqar Ali Bhutto v. State PLD 1979 Supreme Court 741.

¹² Oath of Office for Judges of the Supreme Court and the High Courts, prescribed under Articles 178 and 194 in the Third Schedule to the Constitution of the Islamic Republic of Pakistan.

¹³ *Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v. President of Pakistan* PLD 2016 Supreme Court 61, para 206, pp. 203-4.

¹⁴ First Information Report No. 402/74 was registered at Police Station Ichhra, Lahore on 11 November 1974 at 3.45 am under section 302 (murder, now gat-i-amd) and under section 307 (now section 324) - attempt to kill - of the Pakistan Penal Code, 1860.

¹⁵ The investigation commenced on 11 November 1974 by Sub-Inspector Abdul Hayee, who was the Station House Officer (SHO) of Police Station Ichhra, and continued till 14 December 1974.

¹⁶ CIA's Inspector Abdul Hameed took over the investigation on 15 December 1974.

¹⁷ The closure report dated 1 October 1975 was prepared and submitted under rule 25.57 of the Police Rules, 1937, read with section 173 of the Code of Criminal Procedure, 1898.

¹⁸ Inquiry Tribunal comprising of Justice Shafi-ur-Rehman was constituted under the West Pakistan Tribunals of Inquiry Ordinance, 1969 vide Notification No.SOG-III-6-309/74, dated 13 November 1974, published in the Punjab Gazette on 11 December 1974.

¹⁹ As per the testimony of Abdul Khaliq, Deputy Director FIA (PW 41).

²⁰ The first entry in the case diary (zimni) by FIA is recorded by Abdul Khaliq, Deputy Director FIA, on 24 July 1977, though the file of the case was received by Inspector FIA Muhammad Boota on 8 August 1977.

²¹ Section 173 of the Code of Criminal Procedure, 1898.

²² Section 265-D of the Code of Criminal Procedure, 1898.

- ²³ Criminal Appeal No. 11 of 1978.
- ²⁴ S. Anwarul Haq, CJ, Muhammad Akram, Karam Elahi Chauhan and Nasim Hassan Shah, JJ, dismissing the appeal, while Dorab Patel, Muhammad Haleem and G. Safdar Shah, JJ, allowing it.
- ²⁵ Review Petition No. 5/R of 1979.
- ²⁶ On 1 March 1976.
- ²⁷ Code of Criminal Procedure, 1898, section 190(2) read with section 346(2).
- ²⁸ Ibid., sections 190(2) and 265-A.
- ²⁹ Ibid., section 410.
- ³⁰ Ibid., section 377.
- ³¹ Ibid., section 376.
- ³² Constitution of the Islamic Republic of Pakistan, Article 4(1).
- ³³ Ibid, Article 4(2) (a).
- ³⁴ Code of Criminal Procedure, 1898, section 410.
- ³⁵ Constitution of the Islamic Republic of Pakistan, Part X.
- ³⁶ Article 10A was inserted by the Constitution (Eighteenth Amendment) Act, 2010.
- ³⁷ PLD 1964 Supreme Court 673, p. 710.
- ³⁸ PLD 1988 Supreme Court 416.
- ³⁹ PLD 1993 Supreme Court 341.
- ⁴⁰ Incorrectly mentioned, as it is the International Covenant on Civil and Political Rights.
- ⁴¹ PLD 1996 Supreme Court 324.
- ⁴² PLD 1994 Supreme Court 105.
- ⁴³ PLD 1996 Supreme Court 324, p. 423YY.
- ⁴⁴ Article 10A was inserted by the Constitution (Eighteenth Amendment) Act, 2010.
- ⁴⁵ Under section 337 of the Code of Criminal Procedure, 1898.
- ⁴⁶ Ibrahim v. King, (1975) 3 ALLER 175.
- ⁴⁷ Muhammad Amjad v. State PLD 2003 Supreme Court 704, 717.
- ⁴⁸ Dhani Bakhsh v. State PLD 1975 Supreme Court 187, 191B.
- ⁴⁹ Al-Qur'an, surat Al-Maidah (5) verse 32.
- ⁵⁰ Ishaq v. Crown PLD 1954 Federal Court 335, 343.
- ⁵¹ Illustration (b) of Article 129 of the Qanun-e- Shahadat, 1984.
- ⁵² Qabil Shah v. State, PLD 1960 Karachi 697.
- ⁵³ The majority judgment was authored by Anwarul Haq, CJ, and was agreed by Mohammad Akram, Karam Elahee Chauhan and Nasim Hassan Shah, JJ.
- ⁵⁴ Constitution of Islamic Republic of Pakistan, Article 66(1).
- ⁵⁵ Hakim Ali v. State 1971 SCMR 432, 445C, Habibullah v. State PLD 1969 Supreme Court 127, 130A.
- ⁵⁶ Hakim Ali v. State 1971 SCMR 432.
- ⁵⁷ Code of Criminal Procedure, 1898, section 164.
- ⁵⁸ Mr. Irshad Ahmed Qureshi, Advocate.
- ⁵⁹ Criminal Appeal No. 11 of 1978.
- ⁶⁰ Constitution of the Islamic Republic of Pakistan, Article 179.
- ⁶¹ Ibid., Article 182.
- ⁶² Constitution of the Islamic Republic of Pakistan, 1973.
- ⁶³ Ibid., Article 45.
- ⁶⁴ Order dated 24 February 1978 in Cr. Misc. Petition No. 16-R/79 in Criminal Review Petition No. 5-R/79.
- ⁶⁵ Ibid., authored by S. Anwarul Haq, CJ.
- ⁶⁶ Constitution of the Islamic Republic of Pakistan, Article 4.
- ⁶⁷ Ibid., Article 192(1).
- ⁶⁸ Ibid., mentioned in Article 196.

- ⁶⁹ Ibid., Article 179.
- ⁷⁰ Laws (Continuance in Force) (Fifth Amendment) Order, 1977, Gazette of Pakistan, Extraordinary, Part I, 22 September 1977, PLD 1977 Federal Statutes 441.
- ⁷¹ Gazette of Pakistan, Extraordinary, Part I, 16 September 1978, PLD 1978 Federal Statutes 156.
- ⁷² Rex v. Sussex, [1924] 1 KB 256, per Lord Hewart, Chief Justice of England. The aphorism - justice is not only done, but is also seen to be done' - is a part of the *Code of Conduct to be observed by Judges of the Supreme Court and of the High Courts of Pakistan*.
- ⁷³ PLJ 1977 Federal Statutes 276.
- ⁷⁴ Constitution of the Islamic Republic of Pakistan, Article 216.
- ⁷⁵ K.M.A. Samdani and Mazharul Haq, JJ.
- ⁷⁶ Order dated 9 October 1977 authored by Aftab Hussain, J.
- ⁷⁷ Ibid.
- ⁷⁸ High Court Judges (Oath of Office) Order, 1977, President's Order (Post Proclamation) No. 1 of 1977, High Court (Appointment of Acting Chief Justices). Order, 1977 and Supreme Court Judges (Oath of Office) Order, 1977.
- ⁷⁹ Constitution of the Islamic Republic of Pakistan, Article 5. This Article originally used the word 'basic'. It was replaced with the word 'inviolable' through President's Order No. 14 of 1985.
- ⁸⁰ Ibid., Third Schedule.
- ⁸¹ Articles 213, 214, 215 and 216.
- ⁸² In Latin - audi alteram partem.
- ⁸³ Reverberating the famous line from William Shakespeare's play Hamlet - 'The lady doth protest too much, methinks.'
- ⁸⁴ Zulfiqar Ali Bhutto v. State PLD 1979 Supreme Court 53, paragraph 935.
- ⁸⁵ Begum Nusrat Bhutto v. Chief of Army Staff PLD 1977 Supreme Court 657.
- ⁸⁶ Ibid., 723AA.
- ⁸⁷ Ibid.
- ⁸⁸ Dorab Patel, Muhammad Haleem and G. Safdar Shah, JJ.
- ⁸⁹ Begum Nusrat Bhutto v. Chief of Army Staff, PLD 1977 Supreme Court 657, pp. 721, 763.
- ¹ Reference No. 1 of 2012 PLD 2013 SC 279 (5MB), Cauvery Water Disputes Tribunal case AIR 1992 SC 522 relied upon; Al-Jehad Trust v. Federation of Pakistan PLD 1997 SC 84 (5MB); Reference No. 1 of 1988 PLD 1989 SC 75 (11MB) and Special Reference No.1 of 1955 PLD 1955 FC 435 (5MB).
- ² Fiona Shen-Bayh, Undue Process: Persecution and Punishment in Autocratic Courts, (2022).
- ³ Raymond Suttner, Political Trials and the Legal Process, (1985).
- ⁴ Anthony Pereira, Persecution and Farce: The Origins and Transformation of Brazil's Political Trials, 1964- 1979, (1998).
- ⁵ Juan Méndez, Constitutionalism and Transitional Justice, (2012).
- ⁶ Vinjamuri and Snyder, Law and Politics in Transitional Justice, (2015).
- ⁷ Hakeem Yusuf, Transitional Justice, Judicial Accountability and the Rule of Law, (2010).
- ⁸ I acknowledge and appreciate Mr. Yasser Kureshi's valuable contribution as amicus curiae in shedding light on the crucial concepts of transitional justice and political trials. His amicus brief has been instrumental in navigating these complex topics. Mr. Yasser Kureshi is a departmental lecturer at University of Oxford, UK.
- ⁹ General ® Pervez Musharraf v. Federation of Pakistan PLD 2024 SC 497 and Taufiq Asif v. General ® Pervez Musharraf PLD 2024 SC 610.
- ¹⁰ Sindh High Court Bar Association v. Federation of Pakistan PLD 2009 SC 789 (short order) and PLD 2009 SC 879 (detailed judgment).
- ¹¹ Nawaz Sharif v. State PLD 2009 SC 814
- ¹² Rex v. Sussex Justices [1924] 1 KB 256 per Lord Hewart.

- ¹³ Ramsey Clark, *Injustice against Bhutto in 2 Courts*, (1979) and Ian Talbot, *Pakistan: A Modern History*, (1998).
- ¹⁴ Paula Newberg, *Judging the State: Courts and Constitutional Politics in Pakistan*, (1995).
- ¹⁵ *Benazir Bhutto v. Federation of Pakistan* PLD 1988 SC 416; *Jubilee Insurance v. NBP* PLD 1999 SC 1126; *Nadeem Anwar v. NAB* PLD 2008 SC 645 and *Riaz-Ul-Haq v. Federation of Pakistan* PLD 2013 SC 501.
- ¹⁶ Stanley Wolpert, *Zulfi Bhutto of Pakistan: His life and Time*, (1993) p. 405.
- ¹ Item "(II) Presidency Magistrate" omitted by Criminal Law Amending Ordinance, 1949, Sch.

