IN THE FEDERAL SHARIAT COURT
(APPELLATE JURISDICTION)

PRESENT
MR. JUSTICE SH. NAJAM UL HASAN, CHIEF JUSTICE
MR. JUSTICE DR. FIDA MUHAMMAD KHAN
MR. JUSTICE MEHMOOD MAQBOOL BAJWA

JAIL CRL. APPEAL NO.39-Q OF 2001.

WAZIR MUHAMMAD ALIAS LAL MUHAMMAD, S/O SALEH MUHAMMAD ALIAS RAZA,NAKHAIL BY CASTE, R/O AFGHANISTAN, PRESENTLY AT QUETTA.

APPELLANT

VERSUS

THE STATE RESPONDENT

MURDER REFERENCE NO.2-Q OF 2001.

THE STATE.

VERSUS

WAZIR MUHAMMAD ALIAS LAL MUHAMMAD, S/O SALEH MUHAMMAD ALIAS RAZA, NAKHAIL BY CASTE, R/O AFGHANISTAN, PRESENTLY AT QUETTA.

COUNSEL FOR THE APPELLANT	…	----------
COUNSEL AT STATE EXPENSES (IN MURDER REFERENCE)	…	MEHR SARDAR AHMED ABID, ADVOCATE.
COUNSEL FOR THE STATE	…	SYED ABDUL BAQIR SHAH, ADDITIONAL PROSECUTOR-GENERAL, BALUCHISTAN.
FIR NO. AND POLICE STATION	…	NO.156 OF 1999 P.S. GAWALMANDI, QUETTA.
DATE OF JUDGMENT OF TRIAL COURT	…	24.05.2001
DATE OF PREFERENCE OF APPEAL	…	24.05.2001.
DATE OF HEARING	…	07.02.2018
DATE OF DECISION	…	07.02.2018

JUDGMENT:

Mehmood Maqbool Bajwa, J: Consequent upon the conclusion of trial in case F.I.R. No.156 of 99 registered under Section 17(4) of The Offences Against Property (Enforcement of Hudood) Ordinance (VI of 1979) (Hereinafter called Ordinance VI of 1979) at Police Station Gawalmandi, Quetta, a learned Additional Sessions Judge, Quetta, while concluding the proof of charge against the appellant-convict under Section 396 of The Pakistan Panel Code, 1860 (Act XLV of 1860) (Hereinafter called The Act) recorded conviction under the aforesaid provision of law and awarded him sentence of death subject to confirmation by this Court.

The appellant-convict being aggrieved of the judgment dated 24th of May, 2001, has assailed the legality and validity of said judgment by way of appeal through jail bearing No.39-Q of 2001.

The learned trial Court sent Reference under Section 374 of The Code of Criminal Procedure, 1898 (Act V of 1898) (Hereinafter called The Code) for confirmation or otherwise of sentence of death awarded to the appellant.

2. The convict escaped from jail as pointed out by learned counsel for the complainant on 13th of April, 2004. Factum of escape was confirmed through report dated 27th of October, 2004 submitted by the Superintendent, Central Jail, Machh.

In view of the report, through order dated 23rd of November, 2004, direction was issued to procure the attendance of appellant-convict through non-bailable warrant of arrest which was sent to learned Sessions Judge, Quetta with further direction that in case of non-execution of warrant of arrest, proceedings under Sections 87 and 88 of The Code shall be carried out.

In view of non-execution of non-bailable warrant of arrest, the learned Sessions Judge, Quetta initiated proceedings against the appellant under Sections 87 and 88 of The Code and report was sent to this Court which fact was duly incorporated in order dated 12th of September, 2005. Taking into consideration the report referred to, the appeal was adjourned till arrest of the appellant.

However, appeal was re-listed on 15th of May, 2015. Again non-bailable warrant of arrest was directed to be issued in order to procure attendance of the appellant. The appeal as well as murder reference was listed on different dates of hearing but due to non receipt of report from the SHO police station Gawalmandi, it was being adjourned. On 13th of June, 2017, this Court again issued notice to the appellant with further direction to the District Police Officer, Quetta to submit report regarding the efforts made by police for arrest of the appellant.

On 13th of September, 2017, it was noted that requisite report has not yet been received. Taking into consideration inability shown by previous counsel appointed at State expenses earlier in appeal, preferred through Jail Superintendent, direction was issued to the office to appoint another counsel at State expenses in Murder Reference. On 11th of October, 2017, Muhammad Anwar Inspector (SHO police station Gawalmindi, Quetta) put his appearance, made statement regarding non-availability of appellant with further stance that convict who was Afghan national had left Pakistan for his native country. His statement was also recorded in this regard.

Mehr Sardar Ahmed Abid, Advocate, who was appointed counsel at State expenses put his appearance on the same day.

In view of the report of S.H.O., it was directed to the learned counsel appointed at State expenses as well as learned Additional Prosecutor-General, Balochistan to assist this Court on the proposition whether this Court can proceed

with the appeal of convict as well as murder reference in the absence of convict as well as his represented counsel.

3. We have not only heard arguments on the preliminary point referred to but also on merits in order to determine the legality of conviction and sentence awarded to the convict regarding which confirmation has been sought through Reference under Section 374 of The Code.

4. In the opinion of learned counsel appointed at State expenses in murder reference, appeal cannot be decided in either way in the absence of convict who was of the further view that murder reference should also be kept pending till the arrest of the convict as directed by this Court earlier.

However, learned law officer was of the view that murder reference can be decided even in the absence of appellant-convict contending that the legality of the conviction and sentence awarded to the convict, sent for confirmation has to be decided by this Court and cannot be deferred for an indefinite period.

5. Arguments on merits have also been heard as referred earlier by us in detail which though are not incorporated but will be reflective in the judgment if this Court reaches to the positive conclusion regarding its domain to decide the appeal as well as murder reference in *absentia.*

6. Prior to scanning the law on the preliminary moot point, it is desirable to make reference to Rule 25 of The Federal Shariat Court (Procedure) Rules, 1981, according to which, a Reference submitted to the Court by a lower Court for confirmation of sentence awarded to an accused shall be heard as an appeal and the provisions contained in Chapter-III of the said Rules shall *mutatis mutandis*, apply. Chapter-III of the Rules deal with form, mode of presentation and procedure of hearing the appeal.

7. In order to decide the preliminary issue, two-fold queries are required to be resolved.

i) Whether in the absence of appellant who is fugitive of law, appeal can be decided? If so, what is the appropriate mode?

ii) Whether Reference under Section 374 of The Code can be decided in the same situation or shall be kept pending alongwith appeal till the arrest of convict.

8. Sections 421 to 423 of The Code deals with the procedure for disposal of appeal and powers of appellate court.

Section 421 of The Code deals with summary disposal of appeal (preferred either under Section 419 or Section 420 of The Code). Due to admission of appeal for regular hearing, the provisions under reference are not required to be examined.

Section 422 of The Code describes the stage after admission of appeal. It envisages issuance of notice, which is mandatory in nature, highlighting the time and place of hearing the appeal. The expression "it shall cause notice to be given to the appellant or his pleader,……" used in said provision is of significance. There will be sufficient compliance of the provision if notice is given either to the appellant or his advocate in view of use of word "or" between the expressions "appellant" and "his pleader." Service of notice either upon the appellant or his pleader is not necessary. Admittedly, notices were given to the appellant time and again as is reflected from various interim orders and as such, there is sufficient compliance of Section 422 of The Code.

9. Question of disposal of appeal in such eventuality was dealt with in "Baldeo Dubey and others v. King Emperor" (AIR 1924 Patna 376), "Roora v. Emperor" (AIR 1930 Lahore 659(1), "Biswanath Chakravarty v. Haripada De Dhara and others" (AIR 1959 Calcutta 443), "MUHAMMAD YAR v. CROWN"

(PLD 1950 Baghdad-ul-Jadid 54), "SRIKANTA KARMAKAR v. THE CROWN" (PLD 1951 Dacca 43), "GHULAM MUHAMMAD v. THE STATE" (PLD 1960 (W.P.) Lahore 11) and "MUHAMMAD KHALIL KHALID vs. THE STATE" (1972 P.Cr.L.J. 65).

Examining the provisions of Sections 421 to 423 of The Code, it was held that there is no enabling and permissive provision of law authorizing the Court to dismiss the appeal for want of prosecution if admitted for hearing and appeal in such eventuality subject to issuance of notice has to be decided on merits.

Similar proposition was moot point before learned Division Bench of High Court of West Pakistan (Peshawar Bench) in "KHANAN KHAN AND OTHERS v. THE STATE" (PLD 1966 (W.P.) Peshawar 232). In the report under reference, Khanan Khan and others after trial were convicted and condemned to sentence of death. Two convicts after giving power-of-attorney to an advocate escaped from jail. Appeal was preferred on their behalf. Reference under Section 374 of The Code was also sent by Court of Sessions, Mardan. Dealing with the proposition, it was held at page-240 as under:

> ***"****Under the law, as contained in Section 422 and 423 of The Code, notice of hearing of appeal has to be given to the appellant or his pleader, and where the records have been sent for after hearing the appellant or his pleader, if he appears, the court may dismiss the appeal or accept it or pass such other order as may be necessary. What is, therefore, obligatory is a notice of hearing to the appellant or his counsel and a hearing afforded to him or his pleader, if he appears, but not so, if he or his counsel does not***"*
> *(Emphasis supplied)*

10. Dealing with question of reference under Section 374 of The Code (Murder Reference), while examining provision of Sections 374, 375 and 376, of The Code, it was concluded at same page as follow:

> ***"****It is clear from these provisions that for the completion of the process of confirmation of the death sentence or making any incidental or other order in that behalf, the presence of the convicted person is not necessary, unless it is directed by the High Court for any further inquiry*

> *under section 375, and that there are no limitations whatsoever on the High Court to finalize the matter of confirmation except that it has to wait till the time provided for appeal has expired or if an appeal has been filed, till it is disposed of.***"**

With this background, the appeal of all convicts (including absconder) was decided with disposal of Murder Reference. Two of them were acquitted. While death sentence of two including Gul Hassan (absconder) was confirmed.

Judgment of learned Division Bench was assailed before Apex Court and the Hon'ble Supreme Court approved the view assailed in "GUL HASSAN AND ANOTHER v. THE STATE" (PLD 1969 SC 89). Making reference to the Ratio expounded in "CHAN SHAH v. THE CROWN" (PLD 1956 Federal Court 43) stating the duty of attorneys and counsel in such like cases, it was held at pages-93 and 94 as follow:

> **"***We fully subscribe to this view and reiterate that the attorneys and members of the bar will bear in mind the serious consequence of committing contempt of this Court in moving on behalf of a prisoner who is a fugitive from law. The appeal filed by the counsel on the basis of the power-of-attorney executed by Gul Hassan in favour of Khawaja Muhammad Khan before his absconsion was thus not properly constituted and should have been dismissed by the High Court on that ground alone.*
>
> *In this view Gul Hassan being a fugitive from law and a contemner was not entitled to hearing and leave granted to him on limited questions of law was liable to be rescinded. As to the proceedings under section 374, Cr.P.C., we endorse the view adopted by the learned Judges in the High Court that if a prisoner decamps and thereby forfeits the right of audience the sentence of death may be confirmed in his absence.***"**

Issue was also examined by Apex Court in "JUMA KHAN v. THE STATE" (1969 SCMR 249). Making reference to the provision of The Code under discussion, taking note of sending notice to the counsel for the appellant (since absconded), it was concluded that there is presumption in the absence of evidence to the contrary that notice reached to its destination in due time and as such disposal of appeal on merits in the absence of appellant and his counsel was held to be un-exceptionable.

In the case of "MUHAMMAD ASHIQ FAQIR v. THE STATE" (PLD 1970 SC 177), the Apex Court, while examining the provisions of Sections 421 and 423 of The Code held that absence of appellant or his pleader at the time of regular hearing does not relieve the court of its duty of procuring record and disposing of appeal on merits giving reasons in support of judgment proposed to be given.

In "ASIF ALI v. THE STATE" (PLD 1971 SC 223), moot point again came up for adjudication. The appellant whose appeal was pending before learned Lahore High Court, Lahore, was on bail but was absent and counsel engaged by him was also not present. The learned Single Judge of Lahore High Court proceeded with the hearing after waiting sometime with the assistance of learned counsel for the State. The learned counsel representing the appellant as per record appeared in the court nearly at the end of case, made request for adjournment on the ground of sufficient consumption of time, who ultimately on the direction of the court started arguments reluctantly, but in a manner, so as to waste time and on pointation, he refused to further argue the case, upon which the learned Judge decided the appeal. The circumstances referred above were agitated before Apex Court and it was held at page-228 as follow:

> **"***After giving my anxious consideration to all the relevant events, in which this appeal was concluded by the learned Single Judge in the High Court. I have come to the conclusion that the step taken by him cannot be considered to be illegal or even unjustifiable, to warrant an interference with his judgment. While the learned members of the Bar appearing in cases as officers of the Courts are entitled to all genuine considerations and accommodation in conducting proceedings before the Courts consistently with the onerous responsibilities of the Court itself to discharge its duties diligently and conscientiously, it is impossible to concede that the learned counsel should be allowed to regulate the work or the proceedings in the Court, according to their own choice to suit their own convenience. It would certainly be a disservice to the cause of justice if the counsel were not accorded complete independence in the mode of presentation of their arguments or the exposition of their cases and in all the relevant respects in that behalf, but, at the same time, it would be an equal disservice if, in the dispensation of justice, Courts, in the fulfillment of their duties to do justice, were to be denied the powers to control and regulate the Court proceedings and to confine them to their legitimate and relevant limits, in consonance with the requirements of justice in each case……."*

Mode and manner of disposal of appeal was accordingly endorsed by the Apex Court.

In the case of "MUHAMMAD BAKHSH V. THE STATE" (1986 SCMR 59), Hon'ble Full Bench of the Supreme Court, while relying upon the Ratio of "MUHAMMAD ASHIQ FAQIR" (PLD 1970 SC 177) and making reference to the provision of Section 423 (1) of The Code ruled that appeal has to be decided on merits even in the absence of appellant and his counsel.

Matter was again examined by Hon'ble Larger Bench of the Apex Court in "HAYAT BAKHSH AND OTHERS v. THE STATE" (PLD 1981 SC 265).

In the report under Reference, the whole case law on the proposition was examined and ultimately it was concluded at page-281 as under:

> **"***Before proceeding to the next step relating to the orders which are to be passed in to the light of the foregoing discussions, it is necessary to make three clarifications: (I) That although the treatment of the case of a fugitive from law and justice can also be of general nature, yet in the present discussion it essentially relates to the proceedings before this Court. When applied to other proceedings and or before other Courts, these principles would have to be considered and applied only subject to the law applicable thereto; (2) the same principles are often applied to cases of preventive detention when a citizen seeking redress from a Court refuse to obey or ignore the orders of the very Court which in order to do justice to him requires his appearance or surrender before it. So far there does not seem to be any real conflict between the two fields: one of administration of justice by Courts and the other of maintenance and observance of law, because one factor remains namely, the defiance of the order of or the process connected with the Court proceedings. In every situation the question of surrender would have to be dealt with in accordance with the relevant law; and (3) the concept of doing complete justice in accordance with the principles, already discussed, would not be controlled by any bar of technicality, and notwithstanding the action of the Court in dealing with a fugitive from justice who seeks justice from it in one of the other way, on a proper cause being shown and after due submission of an explanation, the power of review, and in case of need, of rehearing in proper cases would remain in tact.*
>
> *In Cr. Appeal No. 53, the matter is pending in this Court since July, 1976. It has on account of the abscondence of Hayat Bakhsh and Allah Bakhsh son of Mohammad Bakhsh appellants suffered inordinate delay. Their co-convicts are in custody. There is no justification now to await any further the surrender of these two appellants. They are fugitive from justice and have defied the process of this Court. Therefore, in accordance with the principles already discussed, their appeals are dismissed……..."*
>
> *(underlining is our)*

In "NAZAR HUSSAIN v. THE STATE" (1985 SCMR 614), Hon'ble Larger Bench of the Supreme Court of Pakistan while noting the factum of escape of the appellant from jail dismissed the appeal for want of prosecution concluding that the said convict being fugitive from justice has forfeited the right of audience.

In "IKRAMULLAH and others v. The STATE" (2015 SCMR 1002) taking note of the abscondence of Adil Nawab (convict in one appeal, who escaped from jail), the Hon'ble Apex Court reiterating the settled proposition that fugitive from law, losses his right of audience before a Court dismissed the appeal on account of above-mentioned conduct of the said convict.

11. Reference to the case law in para (9) of the judgment reveals that in certain cases keeping in view the provisions of Sections 421 to 423 of The Code, it was held that appeal of appellant despite abscondence has to be decided on merits.

However, in the case of "HAYAT BAKHSH AND OTHERS v. THE STATE" (PLD 1981 SC 265), "NAZAR HUSSAIN v. THE STATE" (1985 SCMR 614) and "IKRAMULLAH and others v. The STATE" (2015 SCMR 1002), which are later in time, having greater numerical strength of Hon'ble Judges in the cases of "HAYAT BAKHSH AND OTHERS v. THE STATE" (PLD 1981 SC 265) and "NAZAR HUSSAIN v. THE STATE" (1985 SCMR 614), appeals of absconders were dismissed keeping in view their conduct without discussing merits.

Pursuant to above, Rule of law expounded in the later-mentioned "Reports" has to be followed.

The appellant before us who escaped from jail, ultimately was declared absconder. Being fugitive of law, has forfeited his right of audience and as such appeal preferred by him is hereby dismissed due to his above-referred conduct.

12. Question of disposal of murder reference in the absence of condemned prisoner can be conveniently answered in affirmative in view of the law laid down in "GUL HASSAN AND ANOTHER V. THE STATE" (PLD 1969 SC 89), in which while endorsing the judgment of learned Peshawar High Court deciding the murder reference in absentia, it was held that since the absconder forfeits right of audience, therefore, sentence of death may be confirmed in his absence.

We also may make reference to the Ratio expounded in the case of "HAYAT BAKHSH AND OTHERS v. THE STATE" (PLD 1981 SC 265) concluding that Reference sent under Section 374 of The Code can be decided even in the absence of absconder condemned prisoner on merits.

13. Consequent upon the settled proposition of law, we may examine the evidence adduced in the light of arguments advanced by learned State counsel as well as learned law officer.

14. Prior to dealing with the merits, it is desirable to narrate the prosecution version in brief in order to appreciate the evidence in its true perspective.

15. Muhammad Umar (P.W.1), brother of Muhammad Ali (deceased) got the FIR lodged while submitting "*Fard-e-Bayan*" (Ex.P-1/A) with the accusation that on 3rd of October, 1999, he alongwith his maternal nephew Muhammad Aslam (P.W.2) and friend Rehmat Ullah (P.W.6) were going to Sarki Road through Street No.4 when his deceased brother was coming back to his house. At the end of Street No. 4, two un-identified assailants emerged there on motorcycle, pointed out pistol upon the deceased, made an attempt to snatch the motorcycle and upon resistance, one of the unknown accused made two fires hitting on the left side of the chest and leg of the deceased. The unknown assailants while snatching the motorcycle managed to escape.

Contents of "*Fard-e-Bayan*" further reveal that one Muhammad Haneef who was standing nearby was in a position to disclose the particulars of said accused and can identify them.

Muhammad Ali (deceased) was taken to the civil hospital Quetta in injured condition who succumbed to the injuries there.

16. It is an admitted fact that in the crime-report, convict was not named and case was registered against unknown accused. The prosecution in order to prove its case banked upon the evidence of complainant Muhammad Umar (P.W.1), Muhammad Aslam (P.W.2), Rehmat Ullah (P.W.6) (eye-witnesses of the occurrence) and in order to establish the identity of convict as a culprit relied upon the identification parade, conducted under the supervisions of Muhammad Aslam, Extra Assistant Commissioner, Quetta (P.W.7) on 26th of October, 1999, in which proceedings, complainant (P.W.1), Muhammad Aslam (P.W.2) and Rehmat Ullah (P.W.6) identified the convict. Medical evidence is another aspect which was relied upon by the prosecution and in this regard reference was made to the evidence of Dr. Sarfarz Jamali (P.W.3).

17. As per contents of F.I.R, Muhammad Haneef who witnessed the occurrence was in a position to disclose the particulars of un-identified assailants, also able to identify them.

Strangely enough, said person who was the natural and best witness was neither associated in the investigation nor cited and produced as a witness.

Whole evidence led by prosecution is nowhere suggestive to justify omission in any manner, whatsoever.

In view of the matter, adverse presumption has to be drawn against prosecution under Article 129(g) of The Qanun-e-Shahadat Order, 1984 (President Order No.10 of 1984).

18. Though, the presence of Muhammad Umar, Complainant (P.W.1) was questioned heavily at the instance of learned State counsel but nevertheless keeping in view the time of occurrence, i.e. 10:00 A.M. and arrival of deceased at 11:00 AM in injured condition in civil hospital, Quetta, who was brought by complainant is sufficient to establish the presence of complainant at the spot.

19. Ocular account furnished by the witnesses (P.W.1, P.W.2 and P.W.6) and medical evidence though proves the unnatural death of deceased Muhammad Ali, to which evidence, no exception can be taken but nevertheless the fact by itself would not be sufficient to prove the culpability of convict for which, as referred earlier, prosecution banked upon the evidence of identification parade.

20. We have gone through the evidence produced by the prosecution on this aspect. At the very outset, it is desirable to add that "*Fard-e-Bayan*" (Ex.P.1/A) as well as contents of F.I.R. does not reveal that the complainant (P.W.1) ever disclosed the description of the unidentified assailants.

It is further to be noted that the witnesses Muhammad Aslam (P.W.2) and Rehmat Ullah (P.W.6) also did not highlight the description of the accused in their respective statements recorded under Section 161 of The Code.

Matter does not end here. Perusal of statement of Rehmat Ullah (P.W.6) recorded before police with which he was confronted reveals that due to considerable distance, he could not properly see the culprits. Though the fact when put was denied by the witness in cross-examination but on confrontation as referred earlier, it was found mentioned in the said statement.

21. Omission to disclose description of un-identified accused is significant, going to the root of the case, putting a serious dent to the case of prosecution and by itself sufficient to brush aside the proceedings of identification parade. Reliance

is placed upon the dictum laid down in "MAULA DAD alias MAULA and others v. EMPEROR" (AIR 1925 Lahore 426), "SABIR ALI alias FAUJI v. THE STATE" (2011 SCMR 563) and "MANSOOR AHMED alias SHAHZAD alias SHEERI and others v. THE STATE" (2012 YLR 2481).

22. Another infirmity which we have noted in the evidence of the witnesses (P.W.1, P.W.2 and P.W.6) is the omission to describe role of the convict in the occurrence.

The said infirmity is also reflected in the proceedings of identification parade (Ex.P.1-B, Ex.P.2-A and Ex.P.6-A). Since, there is an omission on the part of the witnesses to highlight the role of convict as a foe in the identification proceedings as well as in their deposition as a witness, therefore, no implicit reliance can be placed upon the said identification test. Reference may be made to "Lal Singh v. The Crown" (1924) 51 ILR 396), "KHADIM HUSSAIN v. THE STATE" (1985 SCMR 721), "SIRAJ-UL-HAQ and another v. THE STATE" (2008 SCMR 302), "GHULAM QADIR and 2 others v. THE STATE" (2008 SCMR 1221), "SHAFQAT MEHMOOD and others v. THE STATE" (2011 SCMR 537), "SABIR ALI alias FAUJI v. THE STATE" (2011 SCMR 563), "MUHAMMAD FAYYAZ v. THE STATE" (2012 SCMR 522) and "AZHAR MEHMOOD and others v. The STATE" (2017 SCMR 135).

23. It is also worth mentioning that statements of Muhammad Aslam (P.W.2) and Rehmat Ullah (P.W.6) under Section 161 of The Code were recorded on the next day of the occurrence, i.e., 04.10.1999, which fact was frankly admitted by Muhammad Aslam stating that their statements were recorded in police station but it was contradicted by Muhammad Umar, complainant (P.W.1) who in cross-examination while replying the question submitted that his statement, i.e., "*Fard*-

e-Bayan" was recorded in Civil Hospital and just after recording his statement, statements of the witnesses (P.W.2-P.W.6) were recorded.

We are not unmindful of the argument advanced by learned law officer that the delay in recording the statements occurred due to transfer of the Investigating Officer, which fact was also referred to by the learned Trial Court while rejecting the contention of learned counsel for the convict before him but we are dealing with this aspect in order to highlight the contradiction in the stance of prosecution regarding the date and venue of recording the statements. In the circumstances, how the evidence of Muhammad Aslam and Rehmat Ullah (P.W.2-P.W.6) can be acted upon stating in their direct statements regarding the identification of convict as a culprit?

24. Identifying witnesses, i.e., Muhammad Aslam and Rehmatullah (P.W.2 and P.W.6) replying another question categorically questioned the suggestion put to them in cross-examination that the convict was shown to them prior to the identification test held on 26.10.1999. However, perusal of record reveals that statements of Muhammad Aslam and Rehmat Ullah (P.W.2-P.W.6) were also recorded under Section 164 of The Code by Syed Zulfiqar Hasnain, the then Judicial Magistrate, Quetta (D.W.1). Copies of the said statements are (Ex.D-1/A and D-1/C). While recording the statements under Section 164 of The Code, the then learned Judicial Magistrate (D.W.1) called the convict providing an opportunity to cross-examine the said witnesses. In reply to question put by the convict, both the witnesses with one voice admitted that he (convict) was shown to them in the lockup prior to identification parade. Though as referred earlier, there was a denial by both the witnesses in the cross-examination regarding seeing the convict prior to identification test but the replies referred to are sufficient to

question the evidentiary value and binding force of the identification parade which was heavily relied upon by learned law officer.

25. We are conscious of the argument advanced by learned law officer that premium was granted by both the witnesses to the convict but we regret to share and endorse the opinion keeping in view the inter-se relationship of the witnesses (P.W.2-P.W.6) not only with the complainant (P.W.1) but also with the deceased, Muhammad Ali. Muhammad Aslam (P.W.2) admitted in cross-examination that deceased was husband of his sister while Rehmat Ullah is the friend of complainant (P.W.1) as disclosed by the complainant (P.W.1). It is further to be noted that according to complainant (P.W.1), Muhammad Aslam (P.W.2) is son of his sister "*bhanja*".

26. Evidence of Muhammad Aslam (P.W.2) and Rehmat Ullah (P.W.6) further reveals that improvements were made by both the witnesses in their direct statements by adding that one of the assailant made attack upon the head of the deceased but admittedly the said fact was neither disclosed by the witnesses in their respective statements recorded under Section 161 of The Code nor it is the case of complainant (P.W.1) in the F.I.R. It is to be noted that according to Rehmat Ullah (P.W.6), one of the accused gave pistol blow on the head of the deceased but perusal of the Medico-Legal Report does not suggest injury of any kind on the head of the deceased.

Factum of improvement is another aspect raising serious question about the veracity of the witnesses Muhammad Aslam (P.W.2) and Rehmat Ullah (P.W.6). Reliance is placed upon the Rule of law laid down in "AKHTAR ALI and others v. THE STATE" (2008 SCMR 6) and "MUHAMMAD RAFIQUE and others v. THE STATE and others" (2010 SCMR 385).

27. Admittedly, no empty was recovered from the spot. There is no justification highlighted by the Investigating Officer (Maqsood Ahmad-S.I.) (P.W.11), who conducted initial investigation at the spot. Though this aspect can be ignored but in view of the discussion made in the preceding paragraphs, we have no hesitation to conclude that evidence led by the prosecution is not sufficient to prove the culpability of convict.

28. Though, F.I.R was lodged with promptness as argued by learned law officer but the fact by itself is not sufficient to prove the culpability of convict, particularly, when he was not named in the F.I.R.

29. We are also not unmindful of the argument advanced by the learned law officer that how a real brother, complainant (P.W.1) can implicate the convict falsely while letting free the real culprit. The argument though appears to be attractive in form but is of little help to the prosecution in substance in the circumstances of the present case. Inference by itself would not be sufficient to prove the guilt of convict though it could have been used as a positive inference in order to support the convincing and confidence inspiring evidence, which undeniably prosecution failed to produce.

Conviction cannot be based on high probabilities as held in "YASIN alias GHULAM MUSTAFA v. THE STATE" (2008 SCMR 336).

30. Contention raised by learned law officer that medical evidence support the prosecution stands with reference to time of occurrence and nature of injuries sustained by the deceased to which no exception can be taken but nevertheless in the absence of convincing evidence, either direct or circumstantial, the medical evidence which is confirmatory in nature would not be sufficient to connect the convict in the commission of crime.

31. Viewed from whichever angle, evidence led by the prosecution and discussed by no stretch of imagination can prove the case of prosecution beyond shadow of doubt.

Benefit of doubt in the circumstances has to be extended to the convict as a matter of right.

32. Next question for consideration before this Court is what should be appropriate order in the circumstances, particularly, in view of dismissal of appeal of convict due to his conduct being fugitive of law.

Section 376 of The Code provides answer to the query which is re-produced for read reference:

> ***"376. Power of High Court to confirm sentences or annual 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; ……."*

Keeping in view the provision re-produced, this Court is competent to make three types of orders while deciding the Reference under Section 374 of The Code.

33. In view of discussion made in proceeding paragraphs, we have concluded that prosecution failed to prove its case against the convict beyond shadow of doubt formulating opinion to extend benefit of doubt in his favour.

At this stage, it is also desirable to add that the conclusion drawn by learned trial Court recording conviction under Section 396 of (Act XLV of 1860) is also legally not sustainable, as the number of culprits were less than five as is evident from the case of prosecution.

34. Pursuant to discussion made above, we cannot endorse the judgment recording conviction and awarding sentence of death to the convict. We are also of

the considered view that the prosecution also failed to prove any other offence against convict under any other provision of law.

35. Epitome of above discussion is that Reference sent by learned Trial Court cannot be endorsed. Conviction recorded and sentence of death awarded to the convict is hereby set side answering murder reference in negative.

Exercising the powers under Section 376 (c) of The Code, we hereby acquit the convict.

MR. JUSTICE MEHMOOD MAQBOOL BAJWA

MR. JUSTICE SH. NAJAM-UL-HASAN
CHIEF JUSTICE

MR. JUSTICE DR. FIDA MUHAMMAD KHAN

Dated, Islamabad the
07th February, 2018.
Khurram

Approved for Reporting

JUDGE