IN THE FEDERAL SHARIAT COURT
(APPELLATE JURISDICTION)

PRESENT:

MR. JUSTICE DR. SYED MUHAMMAD ANWER, ACTING CHIEF JUSTICE
MR. JUSTICE KHADIM HUSSAIN M. SHAIKH

CRIMINAL APPEAL NO.08-I OF 2021

IMRAN KHAN SON OF ZIARAT GUL, RESIDENT OF SHABQADAR SAEED ABAD.

Appellant

VERSUS

THE STATE.

Respondent

CRIMINAL SUO MOTO REVISION NO.01-I OF 2021

THE STATE.

VERSUS

IMRAN KHAN SON OF ZIARAT GUL, RESIDENT OF SHABQADAR SAEED ABAD.

Respondent

CRIMINAL APPEAL NO.09-I OF 2021

IMRAN KHAN SON OF ZIARAT GUL, RESIDENT OF SHABQADAR SAEED ABAD.

Appellant

VERSUS

THE STATE.

Respondent

Counsel for the Appellant	:	Mr. Shabbir Hussain Gigyani, Advocate.
Counsel for the State	:	Mr. Mujahid Ali Khan, Additional Advocate-General, KPK.
FIR No., Date and Police Station	:	789/2014, 25.09.2014, Faqirabad.
Date of Impugned Judgment	:	03.11.2018
Date of Institution	:	13.10.2021
Date of Hearing	:	09.03.2022
Date of Judgment	:	23.06.2022

J U D G M E N T

KHADIM HUSSAIN M. SHAIKH –J. By means of the captioned Criminal Appeal No.08-I of 2021, received in this Court by way of transfer from the learned Peshawar High Court vide order dated 07.10.2021, appellant Imran Khan son of Ziarat Gul has called in question judgment dated 03.11.2018, passed by the learned Additional Sessions Judge-V, Peshawar in Case No.02/HC of 2015 re-The State vs. Imran Khan, emanating from Crime No.789 of 2014 registered at Police Station Faqirabad, District Peshawar for Offences under Section 17 (4) of The Offences Against Property (Enforcement of Hudood) Ordinance, 1979, **("The Ordinance"),** Sections 411 & 412 of The Pakistan Penal Code, 1860 (XLV of 1860) **("The Penal Code")** and Section 15 of Arms Act, whereby appellant Imran Khan son of Ziarat Gul has been convicted for offence under Section 302(b) of The Penal Code on two counts for murder of two ladies namely Mst. Hazrat Bibi and Mst. Lubna Bibi **(the deceased)** and sentenced to suffer life imprisonment and to pay compensation of Rs.300,000/- (three lac) each to the legal heirs of both the deceased under Section 544-A of The Code and in default of payment of fine he is to further undergo S.I for six months more; he has also been convicted for offence under Section 394 of The Penal Code and sentenced to suffer life imprisonment with fine of Rs.50,000/- and in default of payment thereof to further undergo S.I of three months; and, he has further been convicted for offence under Section 412 of The Penal Code and sentenced to suffer imprisonment for 10 years with fine of Rs.50,000/- (fifty thousand)

and in default of payment thereof to further undergo S.I for 06 (six) months, and whereas the captioned Criminal Appeal No.09-I of 2021 is directed against the judgment dated 03.11.2018, passed by the learned Additional Sessions Judge-V Peshawar in case No.115-AA of 2015 based on the aforesaid crime No.789 of 2014, whereby the appellant has also been convicted for offence punishable under Section 15 of Arms Act and sentenced to suffer rigorous imprisonment of 03 (three) years and five of Rs.5,000/- (five thousand) and in default of payment of fine he is to further undergo S.I for one month. However, the benefit of Section 382-B of The Code, has been extended to the appellant.

2. Briefly the facts of the case as narrated in the subject FIR are that on 25.09.2014 at about 1630 hours, complainant Jamil Anwar Siddiqui son of Muhammad Anwar Siddiqui, who was at Islamabad, received a call from his wife, who told him that when she came back from her parents' house, the door of their house was locked from inside and nobody attended her cellphone call nor opened the door; receiving such information the complainant proceeded from Islamabad and reached at his residence where he found that many people available there and when he went to the second floor of his house where he saw his mother Mst. Hazart Bibi and his sister in law Mst. Lubna Bibi wife of Aqeel Anwar Siddiqui lying dead, having their throats cut, in a room; on the search of the house, gold jewelry weighing 30 tolas and cash amount of Rs.45,000/- were found missing; a police party headed by ASI Tahir Khan on patrolling, receiving information reached at the place of vardhat at 08:00 p.m. and handed down a mursaila on the narration of the complainant,

which was later on incorporated in book under Section 154 of The Code at 09:00 p.m. being the subject FIR and then the police started investigation. During investigation, the police arrested the appellant being suspect, who on interrogation, confessing his guilt, recorded his judicial confessional statement before the learned Judicial Magistrate-V Peshawar, having also got recovered robbed ornaments of gold in presence of marginal witnesses of the memo of recovery prepared at the spot with their signatures; further the appellant also led the police party to his house and on his pointation an un-licenced 30 bore pistol bearing No.FF-3509 loaded with a charger, containing five live rounds of the same bore, was recovered from residential room of his house situated in Mohallah Saeedabad, Tehsil Shabqadar District Charsadda, on show and/or force whereof, the appellant and his absconding accomplice Bilal putting deceased ladies Mst. Hazart Bibi and Mst. Lubna Bibi under restraint and fear, have committed the subject heinous crime, was recovered in presence of marginal witnesses under memo of arrest prepared at the spot with their signatures. Then, after usual investigation, the appellant was sent up to face his trial, showing co-accused Bilal as absconder in the final report under Section 173 of The Code in the main case and whereas a separate challan in offshoot case for offence punishable under Section 15 of Arms Act was submitted against the appellant. After completing all the formalities, separate charges were framed against the appellant in both the cases to which he pleaded not guilty and claimed his trial.

3. In order to prove its case, the prosecution examined in all 15 (fifteen) PWs, having also produced all the necessary documents including mursaila, FIR, postmortem reports, inquest reports, memos of various recoveries, confessional statement of the appellant, memo of place of incident, pointation memos, sketches and FSL reports, etc. and then the prosecution side was closed. Thereafter, the statement of the appellant under section 342 of The Code was recorded wherein he denying the prosecution allegations professed his innocence. He, however, neither examined himself on oath under Section 340(2) of The Code nor did he produce any person as his defence witness.

4. At the conclusion of trial and after hearing the parties' counsel, the learned trial Court convicted and sentenced the appellant vide impugned judgments dated 03.11.2018 as discussed in paragraph-I *supra*.

5. Having felt aggrieved by the impugned judgments, the appellant has preferred the captioned Criminal Appeals. As the sentence awarded to the appellant in the main case did not seem to be proper, hence, this Court took Suo Moto Notice and converted it into the captioned Criminal Suo Moto Revision so as to determine the question of enhancement of the sentence.

6. The learned Counsel for the appellant has mainly contended that the name of the appellant is not mentioned in the FIR; that no proper identification parade of the appellant was conducted; that the stolen ornaments of gold and the pistol were not recovered from the appellant, but the same were foisted upon him; that the confessional statement of the appellant is planted, which per learned counsel has been retracted by the appellant; that the appellant is innocent and he has been

implicated in this case by the complainant party due to their enmity with him; that on 30.09.2015 the charge was framed against the appellant when he was not represented by a counsel; that in absence of the services of defence counsel this case involving capital punishment could not be proceeded with and per learned counsel due to non-availability of the defence counsel, the appellant, who is Pakhtun, has been prejudiced while understanding the case and answering the charge. The learned counsel prays that the impugned judgments may be set-aside and the case may be remanded to the learned trial Court for denvo trial.

7. Learned Additional Advocate General, KPK has mainly contended that the prosecution has examined 15 PWs, who have supported the prosecution case and produced all the necessary documents including mursaila, FIR, postmortem reports, inquest reports, memos of various recoveries, confessional statement of the appellant, memo of place of incident, pointation memos, sketches and FSL reports etc; that the appellant along with his accomplice Bilal, who is still absconder, has committed this heinous crime involving brutal murders of two innocent ladies namely Mst. Hazrat Bibi and Mst. Lubna Bibi during the course of robbery; that the appellant himself confessing his guilt voluntarily recorded his confessional statement before the learned Judicial Magistrate-V Peshawar; that the recovery of robbed ornaments of gold was made on the pointation of the appellant; that the medical evidence is in line with the ocular evidence; that no enmity or animosity of the complainant party with the appellant is alleged; that the prosecution has proved its case against the appellant beyond any shadow of doubt; and that instead of normal death sentence, the lesser sentence of life

imprisonment has been awarded to the appellant by the learned trial Court without any justification. The learned Additional Advocate General, KPK has prayed for dismissal of the instant Criminal Appeal and for enhancement of the sentence. Complainant Jameel Anwar, who is present in person, has submitted that the appellant, who is his cousin being son of his aunt, along with his absconding accomplice Bilal, has committed murders of his mother Mst. Hazrat Bibi and his sister in law Mst. Lubna Bibi by cutting their throats with churries (knives) in brutal and gruesome manner; that the appellant himself confessed his guilt before the learned Judicial Magistrate-V Peshawar and got recovered robbed ornaments of gold, and, that there is no question of false implication of the appellant in this case. The complainant prays that the captioned Criminal Appeals may be dismissed.

8. We have considered the arguments of the learned counsel for the appellant, the learned Additional Advocate General, KPK for the State and the complainant in person and have gone through the record with their assistance.

9. From a perusal of the record, it would be seen that on 30.09.2015 a formal charge was framed against the appellant when he was not represented by any counsel, and it was on 17.12.2015 when wakalatnama for the appellant was filed as is evident from the case diaries of the above dates of hearing. It needs no reiteration that in absence of the services of defence counsel the cases involving capital punishment like the case one in hand could not be proceeded with and such irregularity being incurable vitiates the trial. The appellant, who is not only illiterate, but is also a Pakhtun would definitely have been

prejudiced while understanding the case and answering the charge prepared in English, that is also not shown to have been read-over to the appellant in the language that he understands. Needless to say, on framing of a charge, the trial of the accused, charged against, is commenced and its purpose and object is to tell an accused precisely and concisely as possible the matter, in which he is being charged, that must convey to him with sufficient clearness and certainty as to what the prosecution intends to prove against him, making him aware abreast and alter about the allegations and the basis on which the allegations are levelled against him. The accused is entitled to know its nature at the earliest stage, and of which he would have to clear himself, because the charge is the base and foundation of the prosecution case, and the answer to the charge is also equally important for the ultimate result of the case and fate of the accused; a reasonable, rational and plausible answer to the charge and taking plea (if any) by the accused that may be relevant for defence point of view, for which the proper juncture is the time when the charge is answered. In cases where an accused does not afford to engage a Counsel, the right of an accused to be represented by a Counsel at the State expense is inherent and admitted. In this context, the Rules (1) & (2) of Standing Orders, contained in Peshawar High Court's Rules of Procedure & Khyber Pakhtunkhwa District Courts' Rules and Orders, Instructions, Circulars & Standing Orders, enjoining upon the Sessions Judge to provide services of an advocate to an accused well in time, enabling him to study the necessary documents, being relevant are reproduced here for the sake of convenience:-

> ***"(1) At the time of 'sending' the accused person for trial for an offence punishable with***

> ***death, the 'sending' Magistrate shall, in his order, note whether the accused was represented by counsel in the proceedings before him and whether the circumstances of the accused are such as to permit him to engage his own counsel in the trial in the Sessions Courts, noting briefly the grounds of his opinion.***
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> ***(2) If the Sessions Court is of opinion that the accused cannot afford to obtain legal aid even though the 'sending' Magistrate may have certified that in his opinion he can and no legal practitioner present in the Court is willing to undertake his defence, without remuneration the Court shall make arrangements for the appearance of a legal practitioner on behalf of the accused in time for him to be able to study the necessary documents which should be supplied free of cost."***

Reference in this context can also be made to the case of Khalid Aziz vs. The State PLD 2003 Peshawar 94 wherein the learned Peshawar High Court has held that:-

> ***"The term "trial" has neither been defined in the Code of Criminal Procedure nor in the NAB Ordinance. Its dictionary meaning is "judicial" examination and determination of issues between the parties by the "Judge". However, there can be no dispute that the trial commences on framing of the charge against the accused. Though in the case of Muhammad Anwar v. Haji Malik Khair Din (PLD 1952 Balochistan 39) it was held that the proceedings before as well as after charge is framed be treated as trial but this issue has now been settled once for all by the august Supreme Court of Pakistan in the case of Haq Nawaz v. State (2000 SCMR 785). It is held that commencement of the trial takes place when the charge is framed against the accused.***

> ***However, it is totally a misconceived view taken by the learned trial Court that before framing of the charge, the Court indulges into inquiry under section 265-D Cr.P.C. and the case can be considered at the stage of inquiry. This is a novel view introduced by the trial Court without any backing from law."***

Furthermore, the report under Section 173 of The Code or FIR alone are not the documents, which would show the commission of offence, hence, while framing of a charge the prosecution case as a whole is to be seen, which would include the recovery memos, the site plan, the statement of witnesses under Sections 161 and 164 of The Code, postmortem report (s) and confessional statement (s) of the accused etc. The spectrum of the charge should be such that all eventualities and exigencies till the conclusion of the trial can be met with the caution, so that no prejudice is caused to the either party. A glance at the charge purportedly, framed in the main case, available at page 26-27 of its paper book, would reveal that it is vague in nature lacking in material particulars relating to the actual occurrence; confessional statement made by the appellant before the learned Judicial Magistrate-V Peshawar; recovery of *churries* (Knives) from the place of vardhat, with which, the brutal and cold blooded murders of two innocent ladies namely Mst. Hazrat Bibi and Mst. Lubna Bibi were committed, which despite being essential ingredients, were not mentioned in the charge, causing prejudice to the prosecution. It is also strange enough that the appellant while pleading not guilty is shown to have put his thumb impression on the plea to the charge available at page 27, but that was not signed by the trying Judge and thus, in our humble view, the charge

cannot be deemed to have been framed and recorded. Similarly the charge available at page 22-23 in the paper book of the offshoot case under Section 15 of Arms Act would reveal that it is also vague in nature lacking in material particulars relating to the crime number, preparation of memo of recovery of the subject pistol in presence of marginal witnesses etc, besides that no separate evidence has been recorded in the case under Section 15 of Arms Act, but the learned trying Judge by placing on record the copies of the depositions of the PWs recorded in main case, has passed the impugned judgment, convicting and sentencing the appellant for offence punishable under Section 15 of Arms Act, that in our humble view, has also caused, serious prejudice to the appellant even in offshoot case.

10. It is also worthwhile to mention here that this case is involving horrific crime of cold blooded brutal murders of two innocent ladies namely Mst. Hazrat Bibi and Mst. Lubna Bibi committed during the course of robbery by the culprits by slaughtering and beheading their necks, causing them multiple injuries with knives (churries) in a gruesome manner. And, in such like cases, the approach of the Court should be dynamic and pragmatic and not static, in approaching to the true facts of the case and drawing correct and rational inference and conclusion while deciding such type of cases, as inflicting conviction and imposing sentence is not a mechanical exercise, but it is onerous responsibility to inflict fair, reasonable and adequate sentence, commensurate with gravity and severity of crime, by applying conscious application of mind. It is reiterated that it is duty of a Judge to ensure not only that he dispenses justice, but what is equally of vital importance,

that justice also seems to have been done. And, thus the learned trying Judge was left with no other option, but to make legal determination of the offence, following the mandatory provisions of law. Manifestly, the learned trying Judge was not alive to the law and the facts of the case and he without applying his conscious judicious mind has awarded sentence of life imprisonment as *Ta'zir* under Section 302 (b) of The Penal Code to the appellant, holding that ***"non-mentioning the name of the appellant in the FIR, nor description of any weapon of the offence therein, not taking finger prints from the room and non-recovery of empty from the crime scene throw some doubts on the case, but only to the extent that the accused facing trial is not liable to death penalty",*** which was not the case of prosecution, for, both deceased namely Mst. Hazrat Bibi and Mst. Lubna Bibi were murdered by slaughtering and beheading their necks coupled with other injuries caused to them by sharp cutting weapons namely knives (churries), which were secured from the place of incident. Nothing was brought on the record to even remotely suggest that any fire was made from the pistol and as such there was no question of recovery of any empty of the pistol from the place of incident. Undoubtly, there is no eye witness of the incident and the entire case initially rested on the circumstantial evidence and it is well settled principle that in such a case if the Court feels satisfied about the commission of offence by the accused facing trial on the basis of circumstantial evidence, it will be just and proper to award *Tazir* punishment to the accused, as it is proverbial that a man may tell lie, but the circumstances do not. In the instant case besides that circumstantial evidence, the case is also rested on judicial confession of the appellant recorded before the learned Judicial

Magistrate-V Peshawar, which from its face is inculpatory in nature and it needs no reiteration that conviction in such a case can be based solely on the confessional statement of an accused if it rings true and is voluntary. In such view of the matter, the aforesaid observations of the learned trying Judge for awarding lesser sentence of life imprisonment to the appellant instead of normal sentence of death penalty are not based on the evidence.

11. The close reading of Section 537 of The Code would show that it applies to an error arising out of mere inadvertence, but willful departure from the procedure cannot be cured by pressing into service Section 537 of The Code. Moreover, even an error or defect, if is of legal consequences, violating the fundamental principle of fair trial and due process, as guaranteed under Article 10-A of The Constitution of Islamic Republic of Pakistan, 1973, **("The Constitution")**, which has been inserted in the Constitution by (18th Amendment) Act, 2010, codifying the principle of a fair trial and due process as a fundamental right of an accused facing criminal trial, so that he may not be condemned un-heard or may not be treated unfairly in the process of adjudication, in our humble view is incurable, even otherwise, the concept of fair trial and due process has always been the golden principle of administering of justice, but after incorporation of Article 10-A in The Constitution, it has become more important that due process should be adopted for conducting a fair trial and if anything is done in violation thereof that would be considered to be void. For the sake of convenience Article 10-A of The Constitution is reproduced here:-

10-A. Right to fair trial.-- *For the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process.*

12. The right of fair trial besides being a basic and natural right, as of now, is a fundamental right also and enjoys constitutional protection provided by virtue of Article 10-A of The Constitution. Neither this right could be abridged and denied nor could it be avoided in any manner. The Courts of the country are under constitutional obligation to ensure that the right of fair trial is awarded by observing due process of law. The term fair trial has not been defined in the Constitution and the prerequisites thereof have also not been described, obviously, with intent to give the term the same meaning that is broadly and universally recognized and embedded in the criminal jurisprudence. By now it is well settled law on the subject that the trial in contravention, disregard and non-compliance of substantial and mandatory provisions relating to the mode of conduct of trial, vitiates the trial. In this case, since the accused was not represented through Counsel to defend himself right from very inception of trial i.e. from framing of the charge, therefore, it can safely be concluded that the learned trial Court failed to fulfill its legal obligation by not providing assistance and services of a defence Counsel to the accused as required by law and non-compliance of necessary prerequisites of the trial, which resulted in deprivation of accused from legal assistance, vitiates the trial. Reference in this context can be made to the case of 2020 YLR 159 Naubahar alias

Baharu *Vs.* The State, wherein the learned Lahore High Court, Lahore held as under:-

> ***"It is not the prosecution's stance that the Appellant was procrastinating the trial. In fact, the resume of the proceedings given above reflects that the decision of the case was delayed because of non-availability of the prosecution witnesses. In the circumstances, the learned Additional Sessions Judge committed material irregularity while conducting the proceedings on 25.5.2017 and not affording an opportunity to the Appellant to produce his counsel.***
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> ***We are cognizant of the fact that there is increasing tendency on the part of the accused persons to stymie the trial by not producing their counsel, particularly in capital sentence cases. Courts cannot become hostage to such malpractice. The Hon'ble Supreme Court of Pakistan has already held in Ghulam Rasool Shah's case, supra, that in such a situation the Court should appoint a defence counsel at State expense and proceed with the trial. Relevant excerpt is reproduced hereunder:***
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> ***"Having considered the case of Appellants, we are of the view that the Appellants should be given time to engage a counsel privately of their own choice, failing which the learned trial Court shall provide them the defence counsel at State expense of their choice out of the list maintained by the Court. If the accused fail to engage a counsel of their own***

or refuse to be represented by a defence counsel provided at State expense, the Court will be at liberty to proceed with the trial and the defence counsel so appointed shall be called upon to conduct cross-examination on prosecution witnesses and call for evidence in defence."

Similar view was expressed in Abdul Ghafoor v. The State (2011 SCMR 23)."

13. As far as the conviction and sentence awarded to the appellant for offence punishable under Section 412 of The Penal Code is concerned, patently this is a case of robbery and the object of the intruders was to commit robbery as is manifest from the fact that they had removed ornaments of gold and cash amount of Rs.150,000/- from the house they entered into i.e. the house of the complainant; during the course of robbery they committed murder of two innocent ladies in callous and gruesome manner by cutting their throats with churries (knives); section 390 of The Penal Code which defines robbery is reproduced here for the sake of convenience:-

390. In all robbery there is either theft or extortion.

Theft is "robbery" if, in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carrying away property obtained by the theft the offender for that end, voluntarily causes or attempts to cause to any person death or hurt or wrongful restrain, or fear of instant death or of instant hurt, or of instant wrongful restraint.

Extortion is "robbery" if the offender, at the time of committing the extortion, is in the presence of the person put in fear, and commits the extortion by putting that person in fear of instant death, or instant hurt, or of instant wrongful restraint to that person, or to some other person, and by so putting in fear, induces the person to put in fear then and there to deliver up the thing extorted.

14. A perusal of the record would show that the appellant after his arrest had allegedly made confessional statement before Judicial Magistrate-V Peshawar on 18.10.2014 wherein while confessing the guilt, he had stated that he and his absconding co-accused had committed offence of robbery of ornaments of gold and cash, he also confessed that during the course of commission of robbery they had committed the murder of deceased Mst. Hazrat Bibi and Mst. Lubna Bibi, one of them namely Mst. Hazrat Bibi is his aunt being sister of his mother *(Khaala)* and while the other namely Mst. Lubna Bibi is sister in law of complainant Jamil Anwar, who is son of deceased Mst. Hazrat Bibi. Earlier on his arrest, the appellant alleged got recovered robbed ornaments of gold buried in an under construction Marriage Hall styled Green Marriage Hall located near Putta stop on Wazirabad Road, Sialkot. Under these circumstances it is crystal clear that Sections 411 or 412 of The Penal Code were not attracted for the reason that the appellant by no stretch of imagination could be termed to be a receiver of the subject robbed ornaments of gold etc, even otherwise just as one person could not be simultaneously convicted for an offence under Section 394 of The Penal Code and under Section 412 of The Penal Code as the same person could not be a robber as well as himself the receiver of the booty of the robbery committed by him. Manifestly, the learned trying Judge without applying his judicious mind on such aspect of the case has convicted and sentenced the appellant for offence under Section 412 of The Penal Code, dealing the matter in a very casual and perfunctory way, despite the fact that this matter is involving callous, gruesome and cold blooded murders of two innocent ladies.

15. In view of what has been stated above, it is crystal clear that the impugned judgments, which are violative of the mandatory provisions of the law and procedure, suffering from incurable defects, are not sustainable in law, therefore, we refrain ourselves from dilating upon the merits of the case, lest it may prejudice the case of the either side. Facing with such situation, the learned Additional Advocate General, KPK, despite having conceded to the fact that the learned trial Court during the trial and while passing the impugned judgments has committed the illegalities and incurable defects discussed *supra*, has stressed upon the decision of the case on merits. As it is a fit case for remand to the learned Trial Court for denvo trial from the stage of defect in the trial namely the framing of charges, hence we are left with no other option than to remand the matter to the learned Trial Court. Accordingly, without dilating upon the merits of the case, we are inclined to accept the captioned appeals and set aside the impugned judgments dated 03.11.2018 and remand the matter to the learned Trial Court for denvo trial after framing of fresh charges by adhering to the mandatory provisions of law, applying conscious judicious mind and affording opportunity of hearing to the parties concerned as mandated by Article 10-A of The Constitution, within a span of period of three months from the date of receipt of copy of this judgment. Resultantly, the captioned Criminal Revision having become infructuous is disposed of as such.

JUSTICE KHADIM HUSSAIN M. SHAIKH
JUDGE

JUSTICE DR. SYED MUHAMMAD ANWER
ACTING CHIEF JUSTICE

khurram