

SPL. CR. A.T. JAIL APPEAL NO.10 OF 2022

Appellant: Ayaz Ali @ Sawati son of Muhammad Shireen through Mr. Mehmood A. Qureshi, advocate.

Respondent: The State through Mr. Muhammad Iqbal Awan, Addl. Prosecutor General, Sindh

Legal heirs of the deceased: Through Mr. Faisal Siddiqui, advocate

SPL. CR. A.T. JAIL APPEAL NO.13 OF 2022

Appellant: Ahmed Khan @ Ahmed Ali @ Papu Shah Kashmiri son of Abdul Baqi through Mr. Iftikhar Ahmed Shah, advocate.

Respondent: The State through Mr. Muhammad Iqbal Awan, Addl. Prosecutor General, Sindh

Legal heirs of the deceased: Through Mr. Faisal Siddiqui, advocate

Dates of Hearing: 10.11.2022 and 11.11.2022

Date of Announcement: 21.11.2022

JUDGMENT

Mohammad Karim Khan Agha, J. Appellants Mohammad Rahim Sawati, Muhammad Imran Sawati, Ahmed Khan @ Ahmed Ali @ Papu Shah Kashmiri, Muhammad Amjad Hussain Khan and Ayaz Ali @ Sawati were charge sheeted to face their trial in Special Case No.23(vii) of 2020 (Old Special Case No.17 of 2016) arising out of FIR No.104 of 2013 under section 302/201/202/109/34 PPC, r/w section 11-N/11-V(ii), 7 of ATA 1997 registered at PS Pirabad, Karachi. Appellants were convicted vide impugned judgment dated 17.12.2021 passed by the learned Judge, Anti-Terrorism Court No.VII, Karachi (Central) whereby the accused persons were convicted and sentenced as under:-

- i) Accused Muhammad Raheem Sawati s/o Syed Habib, Ayaz Ali alias Sawati s/o Muhammad Shireen, Muhammad Amjad Hussain Khan s/o Muhammad Jameel Khan, Ahmed Khan alias Ahmed Ali @ Papu Shah Kashmiri s/o Abdul Baqi convicted for the offence punishable under Section 7(1)(a) of ATA, 1997 r/w Section 21-I of ATA 1997 sentenced them to suffer R.I. for life and to pay fine of Rs.2,00,000/- (Two Lacs) each in case of default they shall suffer S.I. for six months each.
- ii) Accused Muhammad Raheem Sawati s/o Syed Habib, Ayaz Ali alias Sawati s/o Muhammad Shireen, Muhammad Amjad Hussain Khan s/o Muhammad Jameel Khan, Ahmed Khan alias Ahmed Ali @ Papu Shah Kashmiri s/o Abdul Baqi convicted for the offence punishable under Section 302 PPC r/w section 109/34 PPC and sentenced them to suffer R.I. for life and to pay fine of Rs.1,00,000/- (One Lac) each in case of default they shall suffer S.I. for six months each.
- iii) Accused Ayaz Ali alias Sawati s/o Muhammad Shireen, Muhammad Amjad Hussain Khan s/o Muhammad Jameel Khan, Ahmed Khan alias Ahmed Ali @ Papu Shah Kashmiri s/o Abdul Baqi and Muhammad Imran Sawati s/o Muhammad Raheem Sawati convicted for the offence punishable under Section 201 PPC and sentenced them to suffer R.I. for seven years and to pay fine of Rs.50,000/- (Fifty Thousand) each in case of default they shall suffer S.I. for six months each.
- iv) Accused Ayaz Ali alias Sawati s/o Muhammad Shireen, Muhammad Amjad Hussain Khan s/o Muhammad Jameel Khan, Ahmed Khan alias Ahmed Ali @ Papu Shah Kashmiri s/o Abdul Baqi and Muhammad Imran Sawati s/o Muhammad Raheem Sawati convicted for the offence punishable under Section 202 PPC and sentenced them to suffer R.I. for six months and to pay fine of Rs.25,000/- (Twenty Five Thousand) each in case of default they shall suffer S.I. for three months each.

All the sentences were ordered to run concurrently and benefit of Section 382-B were also extended to all the accused persons. Fine amounts, if recovered, was ordered to be paid to the legal heirs of the deceased u/s.544 Cr.P.C.

2. The brief facts of the case are that complainant Wali Dad s/o Abdul Rehman recorded his statement u/s.154 Cr.P.C. on 13.03.2013 at about 2115 hours before SIP Zakriya Korejo of PS Peerabad, averring therein that he is employed as a driver at Orangi Pilot Project (OPP) since last 20 years, performing his duty with Director Ms. Perveen Rehman d/o Muti-ur-Rehman. On 13.03.2013, he was driving Ms. Parveen Rehman, Director OPP in car bearing No.AKT-278 Honda City to her home from her office situated near Qasba Curve and when he reached at Pakhutn Market in front of the main road Manghopir he slowed down the car due to a speed breaker when all of a sudden two unknown persons on a motorcycle having unknown registration,

number appeared from left side of the car and initiated indiscriminate firing at Ms. Perveen Rehman, sitting on the rear seat of car. As a result of the firing she received firearm injuries and as such he brought her to Abbasi Shaheed Hospital in the said car, where Doctor declared that Ms. Perveen Rehman had succumbed to her injuries.

3. After registration of FIR, investigation was entrusted to SIP Raja Ulfat Hussain, who visited the place of incident, prepared such memo and sketch of place of incident, collected two empties of 9mm pistol, recorded statements of PWs u/s 161 Cr.P.C. On 15.03.2013 the recovered empties from the spot and vehicle of deceased were sent to FSL for examination and report. The forensic expert Rana Hassan Javed inspected the vehicle of deceased lady Mst. Parveen Rehman and secured two Sikkas from the diggay of the said car and handed over the same to SIP Raja Ulfat who prepared such memo and received such report. During the investigation one Qari Bilal was murdered during encounter with police and case/crime No.86/2013 and 87/2013, U/s: 353, 324, 34 PPC r/w section 7 ATA, 1997 and 13-D Arms Ordinance were registered against him at PS Manghopir and his superior officer directed to him to send both empties to FSL for matching with the alleged recovered weapon from Qari Bilal in the above said crime. He dispatched weapons and empties to FSL, received the report on 19.03.2013, recorded the statement of complainant of crime No: 85/2013 namely Asif Hussain and also enquired from I.O. Ameer Gondal. Later on the car bearing No: AKT-278 was handed over to representative of OPP after obtaining the receipt. He tried his level best to arrest the accused, but could not succeed therefore he submitted his report in "A" class. Later on the complainant party approached the Hon'ble Supreme Court of Pakistan, Islamabad through C.P No: 50/2013 for re-investigation of the case and DIG West was directed to re-investigate the case, the investigation was assigned to SIO/PI Fareed-ud-Din, who also appeared before the Hon'ble Supreme Court of Pakistan at Islamabad, with his superior officer and Hon'ble Supreme Court of Pakistan, Islamabad deputed the Hon'ble District & Sessions Judge West for enquiry and report. On 05.05.2014 Hon'ble Supreme court of Pakistan, Islamabad directed the Provincial Government to constitute a JIT to probe the matter. DIG Sultan Khawaja was the head of JIT and members of JIT suspected the involvement of one Bilal @ Tension, who was in jail custody in another case. PI Fareed-ud-Din obtained NOC from the concerned Court

and custody of above named UTP from the jail, prepared imaginary mashirnama of arrest of accused Bilal @ Tension. During investigation no concrete evidence came on record against him, therefore, he was released u/s 497 (ii) Cr.P.C on 20.09.2014. During investigation he received spy information that accused Ahmed Ali @ Papo Kashmiri is involved in this case. He went to Mansehra (KPK), wherefrom he arrested the accused on 19.03.2015 from his house at about 0020 hours under the mashirnama in presence of mashirs. During interrogation accused Ahmed Ali @ Papu Kashmiri recorded that prior to 15 days of murder of Ms. Parveen Rehman (deceased), he was present in the house of Raheem Sawati, as they both belong to ANP, where Shuldad, brother in law of accused Raheem Sawati were present, to whom accused Raheem Sawati asked that Ms. Parveen Rehman created problems and hindrance to him; therefore, she may be disposed-off. Later on the son of Raheem Sawati namely Muhammad Imran was arrested on 01.08.2015 by the Pirabad Police u/s 54 Cr.P.C. He arrived at PS Pirabad, arrested him and prepared imaginary mashirnama of arrest of accused in the instant case. During interrogation accused Imran Sawati disclosed that his father has gone somewhere else and talked with him over internet. He also wrote letter to SSP (CTD) regarding the information to be obtained from the concerned department whether accused Raheem Sawati went out of the country or was in Pakistan. He received the reply from the FIA Islamabad, which had no travel record of accused Raheem Sawati leaving abroad. He added section 201 and 202 PPC in this crime and challan was submitted against both accused namely Ahmed Ali alias Papu Kashmiri and Muhammad Imran Sawati showing the remaining accused as absconders in column No.II.

4. Accused Raheem Sawati was arrested on 20.05.2016 in FIR Nos.114, 115, 116 of 2016 of P.S Manghopir, U/s: 353, 324, 34 PPC, 4/5 Explosive Substance Act and 23 (1) (a) of SAA, 2013 and was rearrested in the instant case by SIP Raja Ulfat of PS Pirabad under memo when Inspector Fareeduddin was on leave. It came to his knowledge after return from leave that accused Raheem Sawati has confessed his guilt before SSP u/s: 21-H ATA, 1997 produced by Inspector Naveed Ali Shah. On 24.10.2017 he received the information from Inspector Jameel of PS Orangi, that he has arrested the accused Muhammad Amjad Khan in crime No: 310/2017 and 311/2017, U/s: 4/5 Explosive Substance Act and 23 (1) (a) of SAA, 2013 of PS Manghopir, who admitted before Inspector Jameel that he is involved in the instant crime.

He then went to PS SITE-A, where accused was confined, wherein he was re-arrested after interrogation under memo. On 11.12.2017 accused Ayaz Sawati was arrested by the Pirabad Police in crime No.153/2012 u/s. 302/34 PPC. He was informed by the Pirabad Police, he went there and arrested the accused after interrogation in the instant case. He obtained the photos of the car of deceased Mst. Parveen Rehman, CDR record of deceased Mst. Parveen Rehman and after completion of legal formalities on 22.01.2018 submitted challan before worthy Administrative Judge, ATCs, Hon'ble High Court of Sindh, Karachi against all the five accused named above.

5. After arrest of absconding accused Muhammad Raheem Swati charge was framed against the accused Muhammad Rahim S/o. Syed Habib, (2) Muhammad Imran Sawati s/o. Muhammad Rahim Sawati and (3) Ahmed Khan @ Ahmed Ali @ Papu Shah Kashmiri S/o. Abdul Baqi to which they pleaded not guilty and claimed to be tried. Thereafter on 24.10.2017 the absconding accused Muhammad Amjad Hussain Khan was arrested and amended charge was framed against accused Muhammad Rahim Sawati S/o. Syed Habib, (2) Muhammad Imran Sawati s/o. Muhammad Rahim Sawati (3) Ahmed Khan @ Ahmed Ali @ Papu Shah Kashmiri S/o. Abdul Baqi, (4) Muhammad Amjad Hussain Khan S/o. Muhammad Jameel Khan and (5) Ayaz Ali @ Sawati S/o. Muhammad Shireen to which they pleaded not guilty and claimed to be tried.

6. The prosecution in order to prove its case examined 26 witnesses and exhibited various documents and other items. The statements of accused were recorded under Section 342 Cr.P.C in which they denied the allegations leveled against them and claimed false implication by the police. They gave evidence under oath and called two DW's in support of their defence case.

7. After hearing the parties and appreciating the evidence on record, the trial court convicted the appellants and sentenced them as set out earlier in this judgment; hence, the appellants have filed these appeals against their convictions.

8. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment dated 16.10.2021 passed

by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

9. Learned counsel for the appellants have contended that the appellants are completely innocent and have been falsely implicated in this case by the police as this was a high profile murder case and they wanted to show their efficiency to the media and the Supreme Court who had taken notice of the investigation; there was no eye witness to the murder; that there was no last seen evidence in respect of the murder; that it is a case of circumstantial evidence; that as per the amended charge as per the case of the prosecution the person who murdered Ms Perveen Rehman was Shuldad who was a notorious target killer who was let off at the time of submitting the final challon and as such the appellants are only aiders and abettors at best; that the recovered empties at the crime scene and sikka's from the car are not connected to any of the appellants as no weapon was recovered from any of the appellants at the time of their arrest; that no motive was asserted in the FIR and no motive was proven at trial; that the recorded TV interview of Ms Perveen Rehman was inadmissible in evidence and could not be relied upon; that the reports of the JIT's are inadmissible in evidence and the trial court erred by placing reliance on them in order to convict the appellants; that this case did not attract the provisions of the ATA and as such appellant Raheem Sawati's alleged confession under Section 21 (H) ATA was inadmissible; that appellant Raheem Sawati had disowned his confession before the SSP; that even otherwise appellant Raheem Sawati was an aider and abettor so his statement was of no use against any other of the appellants who were also aiders and abettors; that there was no other corroborative/supportive evidence in respect of appellant's Rehman Sawati's confession which could implicate either himself or any other appellant and as such for any or all of the above reasons the appellants be acquitted of the charge by being extended the benefit of the doubt. In support of their contentions, they placed reliance on the cases of **Ghulam Hussain v The State** (PLD 2020 SC 61), **Ali Gohar v The State** (PLD 2020 SC 427), **Muhammad Rafique v The State** (PLD 2018 SC 178), **Mehram Ali v Federation of Pakistan** (PLD 1998 SC 1445), **Aftab Ahmad v The State** (2004 MLD 1337), **Arif Nawaz Khan v The State** (PLD 1991 Federal Shariat Court 53), **Bhuboni Sahu v The Kind** (PLD 1949 Privy Council 90), **Rahimullah Jan v Kashif and another** (PLD 2008 SC 298), **Abdul Mateen v**

Sahib Khan (PLD 2006 SC 538), Ibrahim v The State (2009 SCMR 407), Sajjad Hussain v The State (2021 MLD 163), Intekhab Ahmad Abbasi V The State (2018 SCMR 495), Muhammad Rafique v The State (2010 SCMR 385), Adnan Hussain v The State (2018 YLR 1412), Province of Punjab through Secretary Punjab Public Prosecution Department v Muhammad Rafique (PLD 2018 SC 178), Hayatullah v The State (2018 SCMR 2092), Muhammad Pervez v The State (2007 SCMR 670), Muhammad Akram v The State (2009 SCMR 230), Mehram Ali v Federation of Pakistan (PLD 1998 SC 1445), Abdul Mateen v Sahib Khan (PLD 2006 SC 538), Nadeem Hussain v The State (2019 SCMR 1290), Saddam v The State (2019 MLD 1034), Khalid Javed v The State (2003 SCMR 1419), Faqir Ullah v Khalil uz Zaman (1999 SCMR 2203), Muhammad Shahrukh v The State (2021 P Cr.L J 1826), Khuda Bux v The Crown (1969 SCMR 390), Muhammad Pervez v The State (2007 SCMR 670), Muhammad Idress v The State (2021 SCMR 612), Muhammad Ahmad (Mahmood Ahmed) v The State (2010 SCMR 660), Muhammad Arshad v The State (PLD 2011 SC 350), Syed Muhammad Ahmed v The State (PLD 2006 SC 316), Khan Mir v. Amal Sherin alias Kamal (1989 SCMR 1987), Rahimullah Jan v Kashif (PLD 2008 SC 298), Sajjan Solangi v The State (2019 SCMR 872), Muhammad Jamshaid v The State (2016 SCMR 1019) and Lal Khan v The State (2006 SCMR 1846).

10. On the other hand learned APG and learned counsel for the legal heirs of the deceased contended that the case fell under the purview of the ATA as the deceased was an eminent social worker and her murder was designed to create terror in the locality and that the appellants had never challenged the jurisdiction of the ATC to try the case before the hearing of these appeals; that the confession of Raheem Sawati was legally admissible under Section 21 (H) ATA which implicated all the appellants in the murder of Parveen Rehman; that the other appellants had also confessed their involvement before the police; that the deceased in an interview recorded for the TV in 2011 had named one of the appellants (Raheem Sawati) as threatening her; that the JIT reports implicated the appellants; that the fact that all the appellants had absconded implicated them in the murder and that based on the evidence on record when taken in its totality the prosecution had proved its case beyond a reasonable doubt against the appellants and as such all the appeals of the appellants should be dismissed except the appellants convictions under S.201

and 202 PPC which were not proven. In support of their contentions, they placed reliance on the cases of *Sikandar Ali Lashari v The State* (SBLR 2020 Sindh 981), *Nadeem Hussain v The State* (2019 SCMR 1290), *Ali Raza alias Peter v The State* (2019 SCMR 1982), *Mureed v The State* (PLD 2002 Karachi 530), *Naveed Hussain v The State* (2011 P. Cr. L J 389), *Waris Khan v The State* (2004 MLD 1982), *Akhtar v The State* (2020 SCMR 2020), *Sajid Mehmood v The State* (2022 SCMR 1882), *Ishtiaq Ahmed Mirza and 2 others v. Federation of Pakistan and others* (PLD 2019 Supreme Court 675), *Nasir Khan and others v. The State* (2005 P. Cr.LJ 1), *Zahira Habibullah H Sheikh and another v. State of Gujarat and others* (2004) 4 Supreme Court Cases 158), *Salehon and another v. The State* (1971 SCMR 260), *Fazal Elahi and others v. Crown* (PLD 1952 Lahore 388), *Mojiya Ratna Bhil v. State* (AIR 1961 Madhya Pradesh 10 (V 48 C 8), *Gul Baz v. The State* (2009 YLR 933), *Nadeem Hussain v. The State* (2019 SCMR 1290), *Atta-ur-Rehman and others v. The State* (2020 P Cr.LJ Note 94), *Mobashar Ahmad v. The State* (2009 CMR 1133), *Mushtaq and others v. The State* (2012 SCMR 109), *Gul Wali Khan v. The State* (2003 P Cr.LJ 1264), *Manjeet Singh v. The State* (PLD 2006 Supreme Court 30), *Jalal Ahmed and another v. The State* (2020 P Cr.LJ Note 99), *Shankaria v. State of Rajasthan* (AIR 1978 Supreme court 1248), *The State through A.G, NWFP Peshawar v. Waqar Ahmad* (1992 SCMR 950), *S. Nalaya v. The State* (2004) 2 GLR 500), *Mehruban Shah v. The State* (2014 P Cr.LJ 1036), *Muhammad Wajid v. The State* (2022 YLR 1569), *Aziz Khan and another v. The State* (2020 YLR Note 137), *Ram Bihari Yadav v. State of Bihar and others* (AIR 1998 Supreme Court 1850), *Paras Yadav and others v. State of Bihar* (AIR 1999 Supreme Court 644), *Mst. Roheeda v. Khan Bahadur and another* (1992 SCMR 1036), *Zahir Shah v. Ayaz Ali (Deceased) through Brother and another* (2020 P Cr.LJ 387), *Yasir and 2 others v. Raqaiz Khan and another* (2011 MLD 1214), *Maqbool Ahmed v. The State* (1992 SCMR 2279), *Allah Ditta and another v. The State* (1999 YLR 418 Lahore), *Molvi Muhammad Yaqoob and others v. Hanif-ur-Rehman and another* (PLD 2010 Peshawar 48), *Zubair v. The State and another* (2004 P. Cr.LJ 82), *Usmanullah v. Sharafat Khan and others* (2016 P CrLJ 1558), an unreported judgment in the case of *Avtar Sindh and another v. State of U.T. Chandigarh* dated 23.02.2015, *Azeem Khan and another v. Mujahid Khan and others* (2016 SCMR 274), *The State v. Abdul Ghafoor Khan Niazi and another* (2000 P Cr.LJ 7), *Muhammad Jibran Nasir v The State* (PLD 2018 SC 351), unreported judgment of Supreme Court in Const. Petition No.50 of 2013 (re: Human

Rights Commission of Pakistan through Chairman Zohra Yousuf v Province of Sindh & Ors.), Pakistan Medical and Dental Council v Muhammad Fahad Malik (2018 SCMR 1956), Shahbaz Khan alias Tippu v Special Judge, Anti-Terrorism Court No.3, Lahore (PLD 2016 SC 1) and The State v Muhammad Arif (PLD 2012 Sindh 119).

11. We have heard the arguments of the learned counsel for the appellants, learned Additional Prosecutor General Sindh and learned counsel for the legal heirs of the deceased and gone through the entire evidence which has been read out by the learned counsel for the appellants, and the impugned judgment with their able assistance and have considered the relevant laws including the case law cited at the bar.

12. Based on our reassessment of the evidence of the PW's especially the medical evidence and other medical reports, recovery of empties at the crime scene we find that the prosecution has proved beyond a reasonable doubt that Ms Parveen Rehman (the deceased) was shot and murdered by firearm on 13.03.2013 at about 1930 hours at main Manghopir Road Speed breaker near Pakhtun market Karachi whilst travelling in a Honda civic car registration No.AKT-278 whilst being driven from her office to her home. This fact has not been disputed by any of the parties to the case.

13. What is in dispute is whether the prosecution has proved beyond a reasonable doubt whether any of the appellants played any role in the murder of the deceased as per the charge.

14. The amended charge which was framed against the appellants on 19.03.2018 in respect of the murder of the deceased in material part reads as under;

"That during the month of February, 2013, you accused Raheem Sawati with your companions namely Ayaz Sawati, Amjad Afridi and some other unknown culprits in presence of Ahmed Ali alias Papu Shah Kashmiri, managed a plan to commit the murder of (OPP) Director Ms. Parveen Rehman, you Raheem Sawati also made commitment with your companions that after her murder you will pay the hefty amount to your companions, thereby pursuant to such plan on 13.03.2013 at about 1930 hours at main Manghopir Road Speed Breaker near Pakhtun Market, your companion Shuldad (being brother in law of you accused Muhammad Raheem Sawati) a notorious Target Killer on your instigation and abetment along with an unknown culprit arrived there

on a bike and caused firing upon the Director of (OPP) Ms. Parveen Rahman while she was on her way back to the house from office in a car bearing registration No.AKT-278, due to such firing she succumbed to injuries and took her last breath. Thus, thereby, you have committed an offence punishable U/s.302/109/34 PPC, which is punishable by 7(a) 11-N/11-V(ii) of Anti-Terrorism Act within the jurisdiction of this Court"

15. That from the charge it is apparent that none of the accused have been charged with actually murdering the deceased. Appellant Shuldad (who was named in the challon but was let off) has been accused with others of carrying out the murder on motor cycles. The appellants have been accused of planning, instigating and in effect abetting the murder and as such it is tangible and reliable evidence of this nature which the prosecution has to lead in order to prove the charge even if through only unbroken links in a chain of circumstantial evidence connecting the dead body of the deceased with the neck of the appellants.

16. The law regarding circumstantial evidence makes it clear that such evidence must be viewed with extreme care and caution. With regard to circumstantial evidence leading to a conviction in a capital case it was held as under in **Fayyaz Ahmed V State** (2017 SCMR 2026) at P.2030 para's 5 and 6 which are reproduced as under;

"To believe or rely on circumstantial evidence, the well settled and deeply entrenched principle is, that it is imperative for the Prosecution to provide all links in chain an unbroken one, where one end of the same touches the dead body and the other the neck of the accused. The present case is of such a nature where many links are missing in the chain.

To carry conviction on a capital charge it is essential that courts have to deeply scrutinize the circumstantial evidence because fabricating of such evidence is not uncommon as we have noticed in some cases thus, very minute and narrow examination of the same is necessary to secure the ends of justice and that the Prosecution has to establish the case beyond all reasonable doubts, resting on circumstantial evidence. "Reasonable Doubt" does not mean any doubt but it must be accompanied by such reasons, sufficient to persuade a judicial mind for placing reliance on it. If it is short of such standard, it is better to discard the same so that an innocent person might not be sent to gallows. To draw an inference of guilt from such evidence, the Court has to apply its judicial mind with deep thought and with extra care and caution and whenever there are one or some indications, showing the design of the Prosecution of manufacturing and preparation of a case, the Courts have to

show reluctance to believe it unless it is judicially satisfied about the guilt of accused person and the required chain is made out without missing link, otherwise at random reliance on such evidence would result in failure of justice.

It may also be kept in mind that sometimes the investigating agency collects circumstantial evidence seems apparently believable however, if the strict standards of scrutiny are applied there would appear many cracks and doubts in the same which are always inherent therein and in that case Courts have to discard and disbelieve the same." (bold added)

17. In the case of **Azeem Khan V Mujahid Khan** (2016 SCMR 274) the following was reiterated with respect to circumstantial evidence at P.290 as under;

"In cases of circumstantial evidence, the Courts are to take extraordinary care and caution before relying on the same. Circumstantial evidence, even if supported by defective or inadequate evidence, cannot be made basis for conviction on a capital charge. More particularly, when there are indications of design in the preparation of a case or introducing any piece of fabricated evidence, the Court should always be mindful to take extraordinary precautions, so that the possibility of it being deliberately misled into false inference and patently wrong conclusion is to be ruled out, therefore hard and fast rules should be applied for carefully and narrowly examining circumstantial evidence in such cases because chances of fabricating such evidence are always there. To justify the inference of guilt of an accused person, the circumstantial evidence must be of a quality to be incompatible with the innocence of the accused. If such circumstantial evidence is not of that standard and quality, it would be highly dangerous to rely upon the same by awarding capital punishment. The better and safe course would be not to rely upon it in securing the ends of justice." (bold added)

Applicability of the Anti-Terrorism Act 1997 (ATA)

18. We find that a crucial aspect of this case is whether based on the particular facts and circumstances of the case it falls within the purview of the ATA because if it does not this might have serious ramifications/implications for the prosecution case and some of its most important evidence.

19. The APG and learned counsel for the legal heirs have submitted that the question of jurisdiction cannot be raised at this late stage however it is well

settled that the question of jurisdiction can be raised at any stage of the proceedings especially in the case of a criminal appeal which is a continuation of the trial proceedings. In this respect reliance is placed on the case of **Shaikh Muhammed Amjad V State** (2002 P.Cr.LJ 1317 (Kar) which held as under at P.1353 and 1354 whilst relying on a number of Supreme Court Judgments;

"45. On the other hand, Mr. Raja Qureshi, learned Advocate-General, Sindh, and Mr. Ilyas Khan, learned Special Public Prosecutor, submitted that the appellant could submit an application before the A.T.C. under section 23 of the A.T.A. for transfer of the case to the Court having jurisdiction but it was not done, and therefore, the appellant cannot be allowed to take this plea at the appellate stage. We are not persuaded to agree with the submission because the question of jurisdiction is a question of law and can always be raised by any party at any stage including the appeal. However, if the objection to the jurisdiction is taken at appellate stage it should not involve recording of further evidence and should be on the basis of material already available on record. We are, further of the opinion that so far, the question of jurisdiction of a Court is concerned, a Court itself is required before proceeding with the case to examine whether it has jurisdiction in law to proceed with the case or not. Merely because a party to the proceedings has not taken any objection to the jurisdiction, out of ignorance or for want of proper advice, shall neither debar a party from taking such objection at the appellate stage nor the silence of a party or even waiver shall confer jurisdiction on a Court not vested in it in law"(bold added)

20. A larger bench of the Supreme Court in the case of **Ghulam Hussain v. State** (PLD 2020 SC 61) found that in essence for their to be an act of terrorism there had to be an object, intent, purpose and design to create terror on account of such act. Whether people were terrorized as a by product of the act did not convert the act into one of terrorism nor the fact that it may have been of a particularly brutal nature. Reliance is placed on the following excerpt of **Ghulam Hussains's case** (Supra).

"For what has been discussed above it is concluded and declared that for an action or threat of action to be accepted as terrorism within the meanings of section 6 of the Anti-Terrorism Act, 1997 the action must fall in subsection (2) of section 6 of the said Act and the use or threat of such action must be designed to achieve any of the objectives specified in clause (b) of subsection (1) of section 6 of that Act or the use or threat of such action must be to achieve any of the purpose mentioned

in clause (c) of subsection (1) of section 6 of that Act. It is clarified that any action constituting an offence, howsoever grave, shocking, brutal, gruesome or horrifying, does not qualify to be termed as terrorism if it is not committed with the design or purpose specified or mentioned in clauses (b) or (c) of subsection (1) of section 6 of the said Act. It is further clarified that the actions specified in subsection (2) of section 6 of that Act do not qualify to be labeled or characterized as terrorism if such actions are taken in furtherance of personal enmity or private vendetta." (bold added)

21. The learned APG and learned counsel for the legal heirs have contended that **Ghulam Hussain's case** (Supra) will not be applicable to the instant case as the instant case was decided before the judgment in **Ghulam Hussains's case** (Supra) which has no retrospective effect. We however find that this is not the view which is adopted by the Supreme Court. In the recent case of **Hadi Bux V State** (Criminal Appeal No.348 of 2020) dated 29.11.2021 the Supreme Court whilst hearing an appeal against conviction passed by an ATC and upheld by this court upheld the conviction under section 365 (A) PPC but acquitted the appellants under the ATA despite the case being decided by this Court before **Ghulam Hussain's case** (Supra) was passed in the following terms at para's 2, 3 and 4 as set out hereunder in material part;

"2.....Both the courts below had rightly appraised and reappraised the entire evidence and found that prosecution had proved the case against the appellants and also concurrently concluded regarding the guilt of the appellants. We on our independent evaluation of the evidence available are not able to differ with the said conclusion so far offence under section 365-A PPC is concerned. Consequently, this appeal to the extent of conviction under section 365-A PPC read with section 34 PPC is maintained and sentence of imprisonment for life and forfeiture of property to the extent of rupees fifty thousand each and in case of default to further undergo six months rigorous imprisonment with benefit of section 382-B, Cr.P.C., is maintained and the appeal to this extent is dismissed.

3. However, we observe that there is nothing on record to prove that this occurrence has any nexus with terrorism nor any witness said so. In that eventuality, in view of a larger Bench judgment of this Court reported as **Ghulam Hussain v. the State** (PLD 2020 SC 61), the conviction under section 7(e) of the Act 1997 is not sustainable. Consequently, the said conviction and sentence under section 7(e) of the Act, 1997 is set aside and the appellants are acquitted only to the extent of 7(e) of the Act

1997. However, as already stated their conviction and sentence under section 365-A PPC is maintained.

4. With the above modification in the conviction and sentence, this appeal is **partly allowed**".(bold added)

22. In this case no motive has been asserted in the FIR for the murder. A hotly disputed aspect of this case is the admissibility of the interview which the deceased gave to a journalist in 2011 before her murder and which was aired only after her murder. The learned counsel for the appellants have submitted that it is not admissible as it is not covered by Articles 59, 71 and 2 (c) of the Qanoon-e-Shahdat Ordinance and is also inadmissible under Articles 140, 142 and 153 of the same Ordinance as the appellants were denied their right to cross examine the deceased on this interview and the deceased did not record a Section 161 or 164 Cr.PC statement. We agree with the above contentions and find that the interview to be inadmissible and exclude it from consideration on these grounds and on account of the fact that it has violated the rights of the accused to a fair trial under Article 10(A) of the Constitution as the appellants were denied their right to cross examine the deceased on her interview which also did not come within the purview of a dying declaration. Even otherwise it is *only her opinion* of the prevailing law and order situation in Karachi. The deceased may have named appellant Raheem Sawati in the interview *in a general sense along with many other non accused and political parties but this is hardly compelling evidence against him in respect of this case which occurred 2 years later*. For example during cross examination PW 26 Babar Bakhat who was one of the authors of the final JIT report stated in his evidence as under in respect of the deceased interview;

"It is a fact that through the interviews recorded by Perveen Rehman she leveled general allegations against the political parties in her talks without assigning specific role to either of the accused facing trial before this court"

23. So even if her interview was admitted into evidence it would not be of much evidentiary value to the prosecution against the named person appellant Raheem Sawati (if it was appellant Swati as she did not identify him and there might be other Raheem Sawati's) who it has not even been proven was a member of any political party. It is in effect her *own opinion* on the law and order situation in Karachi which she was not an expert to give. The **interview's importance** however lies in the fact that it tends to establish that

the object, intent, purpose and design to murder the deceased was **not** to create terror on account of such act but to enable land grabbers to grab land which was under the control/supervision of her as a Director of the OPP. It is also significant that this interview was not aired until **two years** after her death so at the time of her murder the law and order situation might have improved or deteriorated and cannot be used to gauge the prevailing law and order situation **two years later** as even if her assessment of the law and order situation was correct (which was not tested during cross examination) some persons and political parties which she referred to may have changed there ways in the intervening period in respect of the OPP. A copy of some excerpts of her interview are set out below for ease of reference to establish this point:

D: Can you describe if there was a particular Incident, or what it was like one of these days? If there was a particular incident or of these days when the violence was really bad and you were trying to come to work?

PR: Many many days, many days. The entire July and August has been like this. Except like 1-2 days, everyday. We would be sitting here, maybe there's a guest coming in: There's firing, severe firing and then we'd get all - there's also fear. There's a lot of fear, and we'd try and strategize: what to do - should we call the rangers, should we call the army? Sometimes it's happened that in front of our gate the people have gathered, and we didn't know, they're not from the community, we don't know where they are from. So it's been many many days. Sometimes we just think let's stay quiet and not do anything, but then you don't know whether you'll be able to reach home for a week or so. What do you do for a week?

There's also been times when we have been threatened in this office. Let me say when there's political conflict then the chotus in the political parties use all this and they become blackmailers and cheaters. So we've had people about three years back - three years back election than a? When first time the ANP came into power? And we had people from ANP coming into our office occupying - one month they were coming, they were threatening us that you leave this place. First they said we want a hall, your hall is great, we want this to have judo-karate lessons. We said as a policy we don't give it out to anybody. Then they would just come, pressure us from various MNA's, MPA's and they, would ring us up. So we said we can't as a policy we can't. Then they started coming every day and threatening us, and we said all right you kill us - that's all you can do, we are not afraid. One day they just came, and from the morning they occupied the roundabout in front of our office. They came with gunmen. About 5-6 of them sat there at the roundabout 5-6 of them went all around, 5-6 of them went into this courtyard trying to threaten us. And they said today we will occupy this place no matter what. So one of our colleagues was negotiating with them, we said, we won't go, you stay, if you want kill us, if you want, kill everybody. We were lucky

that one of the active members of the community who's been working with us, his brother is a bigger thug, yeah? And he belongs to the PPP. Then he said that all right, I will come over, and how can they do anything like this? So he came and talked to them that if you fire, we'll fire many many more rounds. So imagine to save ourselves we went to bigger thug.

D: I mean especially for the foreign, it seems bizaree that someone can come and say look you know, I'm going to occupy. Can you give a sense of why they didn't occupy this thankfully, I mean they're many which they have occupied, and they come just like this? Can you give a sense of why this happens, why there isn't security of property which one expects?

PR: But one more incident I must relate. It's to do with the local, he threatened us, who is now a MPA, he is local MPA of the ANP. He threatened, he came to me, he rang me up and threatened me so many times. He said this is illegal what you all have done. This is our plot, give it back to us. We said the very pint is that we applied to the Government, the Government gave us this, we have paid it, and if you have a battle go and do it with the Government, I think the important thing is if you are scared, if you get scared - that's a strategy - then you've had it. But for us, can you do? So kill us. We're not afraid of you. I think that is important.

Plus secondly one thing I'd like to relate before I answer your question - sorry. Why we are always saved here? Because of your work, of our contacts with the community. It's people all around that save us. It's people all around. If some of the students get out, and somebody from - then we talk to them. It's young men from the community who save us, who go and tell the political parties that why are you doing this? I remember after this thing happened, when they wanted to occupy, there was a word sent to the ANP because you see our members who work here also have political affiliations. Some of them go and sit in the ANP office, some of them go and sit in the MQM office. So they themselves sent in the word, and I remember that one of the Secretaries of the ANP lives right across our office in the big all building. He was told that you are now responsible for this office - if anything happens you will be taken to task. It's the community work that saves all the time, because you see our office is very open you can see - everybody keeps on coming and going.

D: How is that given that you've been here for so long and that you're part of the community, that people can still come...right?

PR: That's very interesting and also how the question you asked before - you must remain me amount that, yeah? You see the thing is that in any, how do I explain this? It's not so much that people in one community are the ones who are threatening their neighbors. It's not that. You see what has happened is, and it's very said about ANP, ANP has learnt all the negative tactics from the MQM what they do is immediately when violence happens, they also have started making units, they send in the unit members of somewhere else to occupy the place. When violence

happened here, we even didn't know these people. Because all our guards and everybody are friendly with everybody. So that said who are these people? We are from the unit, and we're from the unit, and we're from North Nazimabad. So they've used the tactics - they send people from somewhere else - they don't know the people and they can create violence. There are a lot of strands and the people we work with, you see the community members are also people who are by nature, who want to be peaceful. People like us who want to be peaceful, who don't want to do violence beforehand. We do protect ourselves of course by resorting to a bigger thug, Not resorting to violence but getting help from a bigger thug. And knowing who is the bigger thug is very important. The important this is that there are lots of strands, and not necessarily everybody knows that who is threatening whom, when because these people come very quietly.

D: But what determines the timing of it? Do the orders come from above, or is it local economic factors?

PR: Local thugs. For instance, this one thug I won't take his name, who was shot in July, right in front of the gate. I can take his name - Rahim Swat - everybody knows. The point is that they're all extortionists. Kaheen se bhi, whenever they can get some money, they'll try to do that. They try and get money out of somebody. It's just that when you feel there is a complete conflict above, there's a time that you know that you can get away with things. For them, that timing is important; when there's complete conflict between 2 political, i political parties and everybody is involved. Of course governance toh khair hi nai, but thora bohat when there's political harmony, these things are controlled. Toh jab who, one the top they are fighting, to neecy toh khair....

D: Now the question of, you mentioned on it - because of the lack of governance - what is it that makes is so easy, I mean almost accepted, it's almost convention that you can do this? This is something that you're either doing it, and if you're not doing, you have to prepare yourself for it. So can you explain what are the factors which...?

PR: Okay, I like when I say lack of governance, it's very simple, because look at land. You said that some places people can go, thugs can go, and they can get away with the extortion money and occupying that land. If you just look be the Katti Pahari area, which has been the most notorious, I have a beautiful photo which is shows the Nur Jehan police station and right behind it all the plotting takes place. The two together cannot happen if they don't support each other.

D: Do you have it here?

PR: Yeah I have it on my notebook. If they don't support each other, it's very, obvious this will not happen. So 'the breakdown means that everybody's involved in unofficial activity. Official activity, pure activity toh hai hi nahin: whoever is the lesser illegal is now the good persons where everybody is illegal. Dekhein na when a land transaction takes place, a study that we have

done in la supply and the goths of Karachi, there's a fixed amount that goes to the police. I'll give you one example: on a plot of land of Rs. 250,000 for a 100 square yards plot Rs.250,000 is the cost. So in the initial plotting of an acre of plot, the police takes Rs. 250,000 that's standard. You have to give it to the police station. Second, when the plots are sold as a token to buy some sweets, they are given Rs. 5,000 to 10,000 - that's standard. All right? Then in the Rs.250,000, Rs.1,00,000 goes to the owner and his team members, Rs.150,000 is sub divided, ek toh you give to the to the thana, again between various governments officials, revenue departments, local councilors, local nazims, MPA, MNA, everybody - It's divided. Like we said in Rs.250,000, maybe lesser of Rs.100,000 remains with the seller and his entire team - including the owner - but the rest is all subdivided. One estimate that we have made that this land transaction on annually - with a conservative estimate --- has a turnover of Rs.30 billion annually. This is huge. Unimaginable. This is huge.(bold added)

24. With regard to the motive behind the murder being land grabbing as opposed to create terror the evidence of PW 18 Mst Aquila Ismail who was the sister of the deceased is instructive in this regard i.e the fact that land grabbers threatened her sister because they wanted to grab OPP land which the deceased refused to give them. A brief excerpt of her evidence is set out bellow in this regard:

"DEPOSITION OF PW-18....AQUILA ISMAIL (Sister of the deceased)

In, C.P. we made prayer that deceased Mst. Parveen Rehman was murdered for the reason that she prepared documentation of the land, which were reserved for Goths (villages) in Gadap area, Baldia, Kamari, Bin Qasim and Malir, The documentation of the Villages were under progress and there was cell constituted by the Sindh Government under the supervision of Chief Minister of Sindh Qaim Ali Shah. The cell was constituted for the purpose that in the election of the year 2008 the PPP government had promised with the low income people for providing them ownership of the Goths lands. Thereafter, the documentation of the above said lands which were reserved for Goths (villages) in Gadap area, Baldia, Kamari, Bin Qasim and Malir. The documentation of the Villages were under progress and there was cell constituted by the Sindh Government under the supervision of Chief Minister of Sindh Qaim Ali Shah. The cell was constituted for the purpose that in the election of the year 2008 the PPP government had promised with the low income people for providing them ownership of the Goths lands. Thereafter, the documentation of the above said lands of the various part of Sindh Province were prepared by the OPP for submitting the same before Cell. From 2008 to 2013 near about 2000 applications were received and filed the same for regularization and out of which 1056 villages were regularized by the Sindh Government.

After the death of my sister Parveen Rehman the above said project is stopped and there is no progress in above said project. I remained in touch with my sister prior to alleged incident and she told me that due to regularization people could not be dispossessed from the landed property. I advised her that not to do this work due to law and order situation in the area. She replied that she has threats, but the person forcibly and illegally occupied the lands may resist from illegal occupation of Government property. She further disclosed that some person tried to occupied the office land illegally and she has threats in this regard, they surrounded twice illegally to occupy but due to intervention of police and rangers they could not succeed. I advised her to be careful. I am suspicious that person who murder my sister who were occupier the landed property illegally unlawfully as well as land of OPP and my sister doing the job to regularize the same poor persons and same was handed over to them. The map of the above said property were prepared by the OPP organization the person residing therein were confirmed that they soon received the regularization. This above facts stated by me are mentioned in the C.P. filed No.50/2013 before the Hon'ble Supreme Court and C.P. is still pending... .."
(bold added)

25. Even learned APG and learned counsel for the legal heirs submitted that the motive for the murder was land grabbing.

26. Thus, we find that the object, intent, purpose and design of the murder of the deceased was NOT to create terror but rather grab some of the land of the OPP and as such this case did NOT fall within the purview of the ATA and as such all the appellants are acquitted of any offence under the ATA in the impugned judgment. An ATC can still hand down sentences under the PPC if proven beyond a reasonable doubt even if the case has been tried by an ATC. In the case of **Amjad Ali & Others** (PLD 2017 SC 661) the capital sentence was maintained u/s 302 PPC while conviction u/s 7(a) of ATA, 1997 was set aside with observation that the case was rightly tried by Anti-Terrorism Court, same view was taken by the Supreme Court while maintaining capital sentence u/s 302 PPC by setting aside sentence under section 7 of ATA, 1997 in cases reported in 2020 SCMR 78 and 2019 SCMR 1362.

Admissibility of Appellant Reheem Sawati's confession under Section 21(H) ATA

27. The main importance/significance of us finding that this case does not come within the purview of the ATA is the impact that it might have on the

later disowned confession of the appellant Raheem Sawati which was made under Section 21 (H) ATA.

28. Section 21 (H) ATA is set out below for ease of reference;

"[2 1 H. Conditional admissibility of confession.--- Notwithstanding anything contained in the Qanoon-e-Shahadat, 1984 (President's Order No.10 of 1984) or any other law for the time being in force, where in any Court proceedings held under this Act the evidence (which includes circumstantial and other evidence) produced raises the presumption that there is a reasonable probability that the accused has committed the offence, any confession made by the accused has committed the offence, any confession made by the accused during investigation without being compelled, before a police officer not below the rank of a [District Superintendent of Police], may be admissible in evidence against him, if the Court so deems fit;

Provided that the District Superintendent of Police before recoding any such confession, had explained to the person making it that he is not bound to make a confession and that if he does so it may be used as evidence against him and that no District Superintendent of Police has recorded such confession unless, upon questioning the person making it the District Superintendent of Police had reason to believe that it was made voluntarily; and that when he recorded the confession, he made a memorandum at the foot of such record to the following effect.

'I have explained to (...name...) that he is not bound to make a confession and that if he does so any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.

29. Section 21 (H) only applies for offences under the ATA which is a special law. For offences under the PPC a judicial confession can only be recorded under Section S.164 Cr.PC where all relevant legal safe guards must be observed. As with any judicial confession it must be made voluntarily and with the object of telling the truth. Confessions before police officers in respect of PPC offences are inadmissible in evidence.

30. We find that this confession could only have been recorded under the ATA if the ATA was attracted to this case however we have already found that it is not and **as such the confession is admissible in law and we place no reliance on it.**

31. The confession ought to have been recorded under Section 164 Cr.PC before a judicial magistrate to be a judicial confession to be worthy of

consideration and even then if disowned would need to be proven that it was given voluntarily with the objective to tell the truth and that all relevant procedural safe guards had been complied with. **Significantly** most of the appellants upon their arrest or whilst already in police custody **astonishingly** confessed to their involvement in the murder of the deceased despite there being no evidence against them at that time in respect of the deceased murder which carried the death penalty but **none** of them was brought before a judicial magistrate to record their confessions under S.164 Cr.PC despite them being brought before a judge for remand purposes. The confession even if held to be legally admissible (which we have already found it not to be) when read in its entirety supports the fact that the object, intent, purpose and design of the murder of the deceased was not to create terror but to grab land which the deceased refused to give them which would again fortify the fact that this was not a case which fell within the purview of the ATA.

32. Even the language of S.21 (H) ATA as set out earlier makes it doubtful that this confession would have been admissible under the ATA even if the case had fallen within the purview of the ATA always keeping in mind that it is a **"conditional confession"**. This is because the police had no solid admissible evidence against any of the appellants until appellant Raheem Sawati allegedly confessed before PW 16 SSP Akhtar Farooq which indicates that the ingredients for Section 21 (H) ATA to be applicable had not been met. This is because S.21 (H) ATA specifically states in material part that;

"...where in any court proceedings held under this Act the evidence (which includes circumstantial and other evidence produced raises the presumption that there is a reasonable probability that the accused has committed any offence, any confession made by the accused during investigation without being compelled before a police officer not below the rank of DSP may be admissible in evidence against him if the court so deems fit...."

33. In this case **prior** to his confession before the police there was no solid legally admissible evidence at all against appellant Raheem Sawati (who later disowned his confession before the police) or any other of the appellants and as such the ingredients which would have made Section 21 (H) ATA applicable were missing in this case and as such the appellant Raheem Swati's confession is also inadmissible in evidence on this count as well. In this respect reliance is placed not only on the plain wording of S.21 (H) which is

clear and does not require interpretation but also on the case of **Nadeem Hussain** (Supra) which held as under;

"The condition placed by the said section(21(H) ATA) upon admissibility of such a confession before the police is that there must be some other evidence, including circumstantial evidence, which must reasonably connect the accused person with the alleged offence before a confession made by the accused person before the police is accepted by a court worthy of any consideration. Such conditional admissibility of a confession before the police is contingent upon availability of some other evidence connecting the accused person with the alleged offence but in the present case, as we have already discussed above, all the other pieces of evidence relied upon by the prosecution against the appellant had utterly failed to connect the appellant with the alleged offences. In this view of the matter the case in hand was not a fit case wherein the trial court could even consider the confession before the police attributed to the appellant" (bold added)

34. It is true that Section 21 (H) allows confessions before certain ranked police officers to be admissible under certain circumstances but we also have doubts as to the voluntary nature of appellant Raheem Sawatis confession because (i) It was recorded before PW 16 SSP Akhtar Farooq who from his own evidence was supervising/monitoring this case which he knew was under the glare of both the Supreme Court and the media and thus was an interested party in that he was more than keen and highly motivated to obtain such a confession from the appellant Raheem Sawati in order to kick start a case for which **until** the confession of appellant Raheem Sawati there was no tangible evidence against any of the accused. (ii) After making his confession the appellant was not sent to judicial custody but kept in police custody so by way of comparative analysis with judicial confessions under the S.164 Cr.PC and safe guards against forcing accused to make involuntary confessions it cannot be ruled out that the appellant was not pressurized or coerced by the police in making the confession. There may be no procedural law in this respect for confessions under S.21 (H) ATA but we find that it would be prudent if this requirement was complied with after all such confessions under S.21 (H) ATA in order to protect the credibility and integrity of the confession. In the case of **Mehram Ali** (Supra) which dealt with the Constitutionality of certain provisions in the ATA it was suggested that in now Section 21 (H) that the words Deputy Superintendant of Police (DSP) ought to have been substituted by judicial magistrate as such provision was

violative of the Constitution however such a change was **not** made by the legislature in the following terms;

"(v) That section 26 of the Act provides that notwithstanding anything contained in Qanun-e-Shahdat Order 1984, (President's Order 10 of 1984), a confession made by a person accused of any offence punishable under section 7 or section 8 of the Act or an offence covered by sub-paragraph (a) of paragraph 2, or paragraph 3 of the Schedule to the Act, or robbery or dacoity with murder or rape, before a police officer not below the rank of a Deputy Superintendent may be proved against such person. The above provision seems to be violative of Articles 13(b) and 25 of the Constitution. It may be observed that clause (b) of Article 13 of the Constitution confers a fundamental right by providing inter alia that no person shall, when accused of an offence, be compelled to be a witness against himself. Indeed a judicial confession is recorded by a Magistrate which is admissible as a piece of evidence, but keeping in view the state of affairs obtaining in the police force, we cannot equate a police officer with a Magistrate. Additionally, there are very strict requirements which a Magistrate is required to comply before recording a judicial confession of an accused person. These requirements do not find place in the impugned section of the Act. It is true that it will be for the Special Court concerned or for the Appellate Tribunal to accept or not to accept a confession recorded by a police officer specified in the above section, but the fact remains that such a confession is not in consonance with the law and the Constitution.... .."

.....We are, therefore, of the view that the above section 26 cannot be sustained, the same requires to be suitably amended by substituting the words "police - officer not below the rank of a Deputy Superintendent of Police" by the words "Judicial Magistrate". (bold added)

35. Thus, it appears that Section 21 (H) ATA in its current form where a police officer not below the Rank of DSP can still record confessions as opposed to a judicial magistrate is not even law as it has been struck down by the Hon'ble supreme Court as being in violation of Articles 13(b) and 25 of the Constitution especially as the key amendment of replacing a police officer not below the rank of DSP with a judicial magistrate has not been made.

36. In the case of **Aftab Ahmed** (Supra) which also concerned a confession

before a policeman under Section 21 (H) ATA it was held as under at Para's 9 and 10 in material part;

"9. The other piece of evidence which has been relied upon by the learned trial Court while convincing the appellants is the confessional statement of appellant Ziaur Rehman. Though this confessional statement appears to have been recorded after fulfilling all the legal formalities but the very fact that it was recorded by a Police Officer will cast a serious doubt on its voluntariness notwithstanding its admissibility under section 21-H inserted in Anti-Terrorism Act, 1997 by Ordinance No.XXXIX of 2001.

10. How an accused when produced by one Police Officer before another Police Officer can feel free and think that now he is in safe hands and that he is no more accessible to those who are Incharge of the investigation. It is not merely the question of admissibility or otherwise of a confessional statement, it is, in fact the voluntariness or otherwise of a confessional statement before a person who can never be thought to be independent, impartial, non-partisan and apart from those who are entrusted with the job of investigation. How an accused produced before a Superintendent of Police in a bewildered state or even otherwise can understand that a Superintendent of Police is different in his attitude and outlook from other Police Officers. How a sharp line of cleavage can be drawn between the two. Theoretically or on papers this distinction may have some existence but for accused in handcuffs, they are chips off the same block". (bold added)

(iii) Nothing has come on record as to why the appellant wanted to make a confession especially as he was already under arrest in another case which did not carry the death penalty. So why would he want to confess to a case which carried the death penalty for which there was not a shred of evidence against him at the time of his confession in Parveen Rehman's murder case. Such conduct does not appeal to logic, reason, commonsense or natural human conduct. In this respect reliance is placed on the cases of **Muhammed Asif v State** (2017 SCMR 486) and **Mst. Rukhsana Begum V Sajjad** (2017 SCMR 596). (iv) the confession was recorded after 17 days in police custody without any explanation given as to why it took the appellant so long to choose to confess and the confession was given 3 years after the incident (v) The confession itself as set out below does not tend to fit in with the evidence produced by the prosecution in respect of the actual murder of the deceased. (v) Being a piece of circumstantial evidence we must be mindful that the confession was not fabricated by the police;

**"CONFESSONAL STATEMENT OF ACCUSED
U/S.21-H OF ANTI-TERRORISM ACT, 1997**

Question. What have you to say?

Ans: Statement deposed by arrested accused Muhammad Rahim Sawati S/o Syed Habib, involved in case crime No.104/2013, offence

U/s 302/34/202/201 PPC, R/W Section 7 ATA PS. Pirabad, on enquiry, he stated that; " I have remained Ex-Councilor of UC-8 PS-96 and also Ex-Secretary Information of ANF. There is office of Orangi Pilat Project in front of my house, in which workers are doing work since long. In the start of 2011, Ex. President of ANP PS-96 namely Ayaz Sawati came to me and said that "Karata Centre has to construct for my Mohalla Boys and place has to take, from OPP Administration", on which we both went to the office of OPP Administration and met with their head namely Parveen Rehman and said her to give us place from your compound so that we could construct Karata Centre for our area boys, on which she said us that she will reply within 2/3 days. After passing 3/4 days, she sent us message through Waheed who was PPP Councilor of the area and also affiliated with OPP that she cannot give place from compound for Karata Centre. Prior to this, we used to contact from above named woman to give place for our area Pakhtoon people but she used to refuse flatly and further she used to say against me that you have affiliated with land grabber. On such attitude of above woman, one day in the last week of January, 2013, Ayaz Sawati, Amjad Afridi and Ahmed Ali alias Papu Kashmiri were gathered in my house and made plan to Kill above women. We contacted to **Moosa**, Commander of Taliban of our area and **Mahfooz Ullah alias Bhalo** In-charge Kati Pahari through **Mobile Phone of Ayaz Sawati**, and they assured us that they will kill above woman in lieu of some money, on which we assured them that we will pay amount for doing such work. Subsequently **Moosa** again contracted with **Ayaz Sawati** and said him that **Papu Kashmiri** is also required for such target, upon which I and **Ayaz Sawati** directed to **Ahmed alias Papu Kashmiri** to contact with **Bhalo** and **Moosa**. Thereafter on 13-03-13, at Maghrib time, we committed murder of **Parveen Rehman** while making firing in front of **Pakhtoon Market**, and on the same day at 11.00 PM, **Ayaz Sawati** and **Amjad Afridi** came at my home and disclosed me that **Moosa**, **Bhalo** and **Papu** committed murder of **Parveen Rehman**. On the next day of such incident, I and other Mohallah people recorded their statement of such incident and I also got recorded my false statement and did not disclose true facts in my statement. After few times, I absconded away due to fear of arrest by the police. Since I came to know that my name was also adding of such incident, after that I remained serving as driver in **Sawat and Punjab**. During absconding, one time, **Moosa** made that you give **Rs.40,00,000/-** in the name of **Allah Almighty** because we have committed murder of **Parveen Rehman** on your instigation. After few days, some culprits had got conducted cracker attach at my home. On 07-05-2016, Police Party of PS. Manghopir arrested me along with explosive and Arms when I had come to Karachi to meet with my family." (bold added)

Sd/-of Accused."

37. The prosecution it appears from the evidence took little, if any steps, to prove or corroborate the confession. For example, Waheed was not examined. No CDR of the named persons was collected and on the contrary Shuldad, Moosa and Balo who were all named in the confession as participants in the murder were all either not found or let off.

38. Learned APG and learned counsel for the legal heirs have contended that the appellant Raheem Sawati was inconsistent in his defence of his disowned confession however it is well settled that the accused can take any and as many defences as he wants but the onus still rests on the prosecution to prove the case against him beyond a reasonable doubt.

39. Learned APG and learned counsel for the legal heirs have also contended that when a case is transferred to another court under S.23 ATA there is no need to re-record any evidence and as such the confession if already on record will remain in tact. We find that there may be no need to re-record any evidence but ultimately it will be for the trial court after hearing final argument of the parties to decide, unless it has already done so, whether any piece of evidence is legally admissible before writing the judgment as a trial court judge cannot consider inadmissible pieces of evidence especially given the fact that such evidence may have been recorded before another court. **Even otherwise**, it is for the appellant court to rule on the admissibility of any piece of evidence if challenged at the appellant stage even if the trial court held it to be admissible as we have already done so with respect to the interview of Ms Parveen Rehman earlier in this judgment

40. **As such we hold the disowned confession of appellant Raheem Sawati made before PW 16 SSP Akhtar Farooq inadmissible in law and place no reliance on it.**

Even if all the evidence had been admissible

41. **Even, if we had found** that this case did fall within the purview of the ATA and appellant Raheem Sawati's confession had been held by us to be admissible in evidence since it was a confession by one aider and abettor against other aiders and abettors and their co-accused there would have to be some other independent evidence of unimpeachable nature to support and or

corroborate it in order for it to lead to a conviction of any of the co-accused and it could only be used as circumstantial evidence against a co-accused i.e the other appellants apart from appellant Raheem Sawati. In this respect reliance is placed on the cases of **Arif Nawaz Khan** (Supra), **Abdul Mateen** (Supra), **Sajjad Hussain** (Supra), **Mobashar Ahmed** (Supra) and **Mustaq** (supra).

42. Even otherwise confessions under Section 21 (H) ATA are always treated as a suspicious piece of evidence unless there was compelling reasons not to produce the accused before a judicial magistrate in order to record his confession of which there was plenty of opportunities in this case and as such are of lesser evidentiary value than a confession recorded under S.164 Cr.PC. In this respect reliance is placed on the case of **Saddam** (Supra) which held as under with regard to confessions under Section 21 (H) ATA;

10. As far as the abscondence is concerned, it cannot come for rescue of the prosecution when there is no other corroboratory evidence to connect the accused with the crime. The learned Dy. Advocate General laid much stress that the confessional statement of the accused is sufficient to maintain his conviction. We are at pain to observe that it has been held by this Court in number of judgments that the accused must be produced before a judicial Magistrate for recording their confessional statements as the statement under Section 21-H, howsoever transparent cannot be substitute of a confessional statement recorded under Section 164, Cr.P.C. The confessional statements recorded under Section 21-H of Anti-Terrorism Act, 1997 are always treated as suspected piece of evidence until and unless it is shown by the prosecution that there were some compelling circumstances which were beyond the control of the investigation agency to produce the accused before a Judicial Magistrate. We repeatedly asked the learned Dy. Advocate General to point out any such circumstances but he kept his lips tight. The Hon'ble Supreme Appellate Court in a judgment passed in Cr. PLA No. 10/2011, titled (Atteq Hussain v. State) dated 21-09-2011 has held that the confessional statement recorded by a police officer shall not be admissible in evidence. Paras. 16, 17, 19 and 20 are relevant which are re-produced for ready reference:-

16. This is basic principle of criminal administration of Justice that an accused is and innocent child of law unless he is proved guilty and this principle is based upon the concept of Justice in Islam., There is no cavil to the proposition of law that conviction can alone sustain on the basis of even a retracted confession made by and accused

person before a Judicial Officer if it is found truthful and confidence inspiring and since no sanctity is attached with the confession of guilt before a Police Officer, therefore, such confession cannot be considered at par to the Judicial confession and is not admissible in evidence to be made basis of conviction. The question of admissibility of confession before a police officer under Section 21(h) of Anti-Terrorism Act, 1997 was considered by the Supreme Court of Pakistan in Mahram Ali Case (PLD 1998 SC 1445) supra wherein it was held that confessional statement before a police officer was not admissible and observation was made for suitable amendment of Section 21(h) of Anti-Terrorism Act, 1997. This is settled law that a confession made before a judicial officer subject to the credibility of statement is admissible in evidence whereas a confession made before a Police Officer or any other person in authority or a private person may have no legal sanctity and can hardly be treated an extra judicial confession in law. The confession of an accused under custody before a Police Officer may not be free from undue influence and coercion as Police custody itself is considered coercion and a statement during custody may not be voluntarily. This is settled principle of constitutional law that a person an accused of an offence cannot be compelled to be witness against himself and in that context the Judicial confession made by an accused voluntarily before a Magistrate which is recorded after fulfillment of legal requirement may be admissible as evidence against him but a confession made before Police Officer cannot be equated with the confession before Magistrate because no presumption of its being voluntary can be attracted with such a statement.

17. There is no compulsion for the court to accept the confessional statement of accused recorded by a Judicial officer or a Police Officer but fact remains that a confession made before a Judicial officer has evidentiary value to be accepted as evidence whereas a confession made before a police officer is not considered a legal evidence. The official authority of Police Officer may create an impression of compelling the accused to make confession and Supreme Court of Pakistan in Mehram Ali v. Federation of Pakistan (PLD 1998 SC 1445) having exhaustively dealt with the issue declared the provision of Section 21-H of Anti-Terrorism Act, 1997 ultra vires to the Articles 13 and 25 of the Constitution of Pakistan. The Anti-Terrorism Act, 1997 is a federal law which has been made applicable in Gilgit-Baltistan and a provision of federal law declared by the Supreme Court of Pakistan ultra vires to the constitution of Pakistan can no more be treated as part of statute and would have no legal effect.

19. In the light of the above discussion there can be no departure to the principle that a confession before a Police Officer is not admissible in evidence under the provision of Qanun-e-Shahadat Ordinance, 1984 and cannot be used as evidence against the accused at the trial at par to the Judicial Confession for the purpose of conviction. The confession before a Police officer may carry the presumption of coercion and undue influence unless it is established on record that an accused voluntarily made a statement before a Police officer quite free from an influence or coercion. The voluntary confession before a Police officer who is not associated with the investigation of case may have the status of extra judicial confession which is very weak type of evidence and cannot be relied upon without independent corroborative evidence of sound and unimpeachable character.

20. In consequence to the above discussion we hold that the confession before a police officer is not admissible as evidence of guilt and provision of section 21-H of the Anti-Terrorism Act, 1997 being violative of Article 17 of Gilgit-Baltistan (Empowerment and self Governance) Order, 2009 read with Articles 13 and 25 of the Constitution of Pakistan unless suitably amended as observed by Supreme Court of Pakistan in Mehram Ali's Case supra cannot be treated valid law. This is important to point out that in terrorism cases, usually direct evidence is not available and culprits may get undue benefit of the situation therefore, in the light of Supreme Court of Pakistan in Mahram Ali's Case, the suitable amendment in Section 21-H of Anti -Terrorism Act, 1997 is necessary and Chief Secretary Government of Gilgit-Baltistan will take up the matter Ministry of Law, justice and human Rights, Government of Pakistan for the amendment in Section 21-H Anti-Terrorism Act, 1997 on priority".

43. Thus, even if we were to hold the confession of appellant Raheem Sawati to be admissible in evidence under Section 21 (H) ATA it must be viewed with suspicion and given lesser weight than a confession before a judicial magistrate.

44. With regard to appellant Raheem Sawati the other corroborative evidence in respect of his confession which directly implicates himself in the murder according to learned APG and learned counsel for the legal heirs are (a) the interview of Ms Raheem which was conducted two years before the incident (which we have already held to be inadmissible) and even if this piece of evidence is held to be admissible it only shows that appellant Raheem

Sawati and many other persons and political parties were into land grabbing in the OPP area and were prepared to use force in order to achieve their objectives. There is no mention of any immediate plan, conspiracy etc to kill her by appellant Raheem Sawati and (b) the fact that appellant Raheem Sawati had absconded. When taken together we find that all these pieces of evidence even if held to be admissible do not prove the charge against the appellant Rehman Sawati beyond a reasonable doubt especially when the appellant is entitled to the benefit of the doubt.

45. With regard to all the other appellants according to learned APG and learned counsel for the legal heirs apart from the confession of their co-accused appellant Raheem Sawati implicating them in the murder of the deceased (which is only a circumstantial piece of evidence against them) the only other corroborative/supportive evidence against them is the fact that they all absconded. When taken together we find that these pieces of evidence even if held to be admissible do not prove the charge against the other appellants beyond a reasonable doubt especially when the other appellants are entitled to the benefit of the doubt.

Law on Aiders and Abettors and common intention.

46. The principle accused as per the prosecution case in the charge and as per the evidence are the murderers of the deceased who shot her by fire arm. Namely, Sheldon, Mossa and Bhalo and as such as per the charge the appellants are only aiders and abettors in her murder.

47. With regard to aiding and abetting (Section 107 PPC) and common intention (Section 34 PPC) for which the appellants have been charged with in respect of the murder of Perveen Rehman.

48. Section 107 PPC concerning abetment is set out below for ease of reference;

"107. Abetment of a thing. A person abets the doing of a thing, who—

First.—Instigates any person to do that thing; or,

Secondly.—Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal

omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

Thirdly.--- Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation 1 — A person who, by willful misrepresentation, or by willful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

49. In the case of **Sajjad Hussain V. The State** (2022 SCMR 1540) it was held as under with regard to abetment;

"So far as the allegation of abetment against the petitioner is concerned, perusal of section 107, P.P.C. reveals that three ingredients are essential to establish/charge any person as conspirator i.e. (i) instigation, (ii) engagement with co-accused, and (iii) intentional aid qua the act or omission for the purpose of completion of said abetment. However, all these three ingredients of section 107, P.P.C. are squarely missing from the record."

50. Based on the particular facts and circumstances of this case and evidence on record we find that the required ingredients of S.107 PPC have **not** been proven against any of the appellants. This is because there is no evidence that these appellants **instigated** any of the alleged murderers as per charge (and it appears that no serious efforts were made to track down the actual murderers despite their being 3 JIT's and some of the murderers named in appellant Raheem Sawati's alleged confession and even one of the alleged murderers in the charge was let off and was not an accused i.e Shuldad, Moosa and Bhallo which is quite inexplicable); that there is no evidence that any of the appellants either knew or were connected in any way to Qari Bilal whose recovered pistol matched the empties recovered at the crime scene; that there is no evidence that the appellants entered into **any plan or conspiracy** to murder the deceased. The place of wardat where the plan and or conspiracy was allegedly hatched was not even visited by the IO and no CDR data was collected to link any of the appellants to each other or any of the alleged persons who committed the murder as per appellant Raheem Sawati's alleged confession either before or after the murder or even to confirm the location of the appellants at the time of the murder; there is little, if any, reliable evidence that prior to and after the murder that the appellants were even meeting each other regularly; **there is no evidence that they acted or omitted to do**

anything to abet the murder. For example, provide the firearm, pay the hired assassin etc.

51. With regard to Section 34 PPC which is set out below for ease of reference;

"34. Acts done by several persons in furtherance of common intention. When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone."

52. In the case of *Shakeel Ahmed v The State* passed in Cr. Appeal No.231 of 2022 the perquisites of common intention was set out as under;

"6. After having gone through almost entire law qua the provisions as contained in section 34, in our considered view the following are the prerequisites of the section 34 before it could be made applicable:

- (a) It must be proved that criminal act was done by various persons.*
- (b) The completion of criminal act must be in furtherance of common intention as they all intended to do so.*
- (c) There must be a pre-arranged plan and criminal act should have been done in concert pursuance whereof.*
- (d) Existence of strong circumstances (for which no yardstick can be fixed and each case will have to be discussed on its own merits) to show common intention.*
- (e) The real and substantial distinction in between 'common intention' and 'similar intention' be kept in view.*

7. We have examined the case of appellant on the touchstone of criterion as discussed hereinabove and in the light of evidence which has come on record. No evidence worth the name could be led showing that there was a prior concert of mind or planning qua commission of alleged offence. The proclaimed offenders Iftikhar and Shahzad fired upon Nasir Mahmood and Muhammad Hussain which resulted into death of Nasir Mahmood and injured Muhammad Hussain who later on succumbed to the injuries. The prosecution has failed to prove that the appellant had any knowledge about the incident what to say about the prior concert of mind and planning. Being driver of the car the appellant cannot be held vicariously liable for the commission of alleged offence in the absence of any specific role attributed to him qua facilitation or abetment. The learned High Court has relied upon the motive without having taken into

consideration that Iftikhar P.O. had nourished grudge and enmity against the complainant party as his brother Akbar was killed and in retaliation whereof he had burnt the house of complainant party. The appellant had no concern whatsoever with the said dispute. The factum of absconson has also been taken into consideration by the learned High Court which alone is not sufficient to award conviction under section 302, P.P.C. as it is just a corroboratory piece of evidence".(bold added)

53. With regard to common intention it was held in the case of **Shoukat Ali V State** (PLD SC 2007 93) as under;

"We would like to discuss the import and objects of section 34, P.P.C. The main object for the enactment of section 34 is 'to meet a case in which it may be difficult to distinguish between the acts of individual members of a party or to prove exactly what part was taken by each of them. The reason why all are deemed guilty in such cases is, that the presence of accomplices gives encouragement, support, and protection to the person actually committing the act. The nature of the offence committed by an accused depends upon the act done by him and the effect produced by it, and the sole object- of this section is to lay down what act will be deemed to be done by the conspirators. This section is not a punitive section and does not enact a rule of evidence but enacts a common law principle of substantive law' 1935 Cr.LJ 1393, 1953 all. 214. "This section embodies the common-sense principle that if two or more persons intentionally do a thing jointly it is just the same as if each of them had done it individually. If two or more persons combine in injuring another in such a manner that each person engaged in causing the injury must know that the result of such injury may be the death of the injured person, it is no answer on the part of anyone of them to allege and perhaps prove that his individual act did not cause death, and that by his individual act he cannot be held to have intended death. Everyone must be taken to have intended the probable and natural results of the combination of acts in which he joined. All are guilty of the principal offence, not of abetment. But a party not cognizant of the intention of his companion to commit murder is not liable, though in his company, to do an unlawful act." In re Basappa (Vol 51 Cr.LJ 1950). "common intention implies acting in concert, existence of a pre-arranged plan which is to be proved either 1 from conduct or from circumstances or from any incriminating facts. The leading feature of this section is the element of participation in action. It embodies a principle of joint liability in the doing of a criminal act,

and the essence of that liability is the existence of a common intention." (bold added)

54. Again with regard to common intention in the case of **Muhammed Arshad v State** (PLD 1996 SC 122) it was held as under;

"The essence of liability envisaged under this section lies in the existence of a common intention and to attract the application of this provision, it has to be shown that the criminal act complained of was done by one of the accused in furtherance of common intention of all. Now the intention is a state of mind which is not susceptible of direct proof and can only be inferred from the attendant circumstances of the crime. A priori, the existence of common intention which usually consists of motive, pre-content and pre-arrangement cannot always be proved by direct evidence. In some cases, direct evidence such as confessions or testimony of approver may be available to prove the common intention but in most of the cases, it has to be gathered from the facts disclosed in evidence and surrounding circumstances of the case. Refer "Khushi Muhammad and others v. The Crown" 1969 SCMR 599 wherein the contention that in the absence of any direct or circumstantial evidence to show previous concert or arrangement between the accused-appellants, inference of a common intention was not justified, was repelled and it was observed, "intention is a mental condition and has often to be gathered from the facts and the surrounding circumstances. One cannot always expect direct evidence to be forthcoming on a matter of this nature". Similar view was expressed by the Federal Court in an earlier case "Bahar v. Crown" reported in PLD 1954 FC 77.

12. Viewed in the light of the aforesaid principles, section 34, P.P.C. is fully attracted to the facts of the present case. From the evidence brought on the record, it is quite clear that all the three appellants, who are real brothers, had a common motive/grievance against the deceased for his having constructed or attempting to construct a wall on a piece of land which the appellants claimed was part and parcel of the plot owned by one of them. It is also in evidence that on the day of the occurrence, all the three appellants came to the spot together, two of them were armed with guns and the third was having a knife with him and on reaching the spot, they asked the deceased whether he would settle the dispute about the land or not. On the latter's reply that they should bring Anwar, the Property Dealer who would decide about the dispute, the appellants told him that they would take the land from him whereupon Afzal appellant raised Lalkara and grappled with the deceased. As stated above, Arshad appellant then fired at the deceased who fell down and later expired. He also gave a blow

with the butt of his gun at the head of Mst. Irshad Begum wife of the deceased. Afzal and Akram appellants did not lag behind and fully participate in the occurrence. On the facts found by the Courts below, Akram fired at the deceased's daughter Mst. Naseeb Akhtar which hit her leg and he also gave a blow on her head with the butt of his gun. Afzal too gave a knife blow at the back of Mst. Surrya Akhtar, another daughter of the deceased. The evidence on record quite clearly shows the appellants came fully prepared and with common intention to take the land in dispute from, the deceased forcibly. In the overall circumstances, we are satisfied that the act of firing by Arshad appellant at the deceased was in furtherance of common intention fully shared by Afzal and Akram appellants. They were, therefore, rightly held vicariously liable for the murder of Khadim Hussain deceased. Their conviction under section 302/34, P.P.C. is thus not open to any exception".(bold added)

55. Again with regard to common intention it was held in the case of **Hasan Din v The State** (1978 SCMR 49) as under;

"In our view the learned counsel has misconceived the correct application of section 34, P.P.C. The mere presence of a person on the spot does not necessarily attract section 34, P.P.C. This section is not to be applied lightly, particularly in acquittal cases. Vicarious liability cannot be visited unless there is some strong circumstances to show common intention. In view of the foregoing discussion, we think Bashir respondent has been rightly given the benefit of doubt".(bold added)

56. Again with regard to common intention the governing legal principles were well set out in the recent Supreme Court case of **Bashir Ahmed v State** (2022 SCMR 1187) which essentially emphasized the above mentioned legal principles.

57. We appreciate that common intention can often only be inferred from the evidence as often there is no direct evidence of the same but in this case we find that no such inference can be drawn from the evidence in respect of the appellants since there is hardly any evidence against any of the appellants even if all the available evidence was held to be admissible by us which it has not been.

Other evidence.

58. It appears from the evidence that a fire arm was recovered from Qari Bilal (with whom no evidence has come on record that any of the appellants

had any connection with) when he was killed in a police encounter and his recovered pistol matched the empties recovered from the scene of the crime in respect of the deceased murder and as such there is likelihood that he was involved in the murder of the deceased however no further investigation was ever carried out in respect of this aspect of the case. **In any event the empties recovered at the scene, the sikka's recovered from the deceased car and the positive FSL reports cannot be connected with any pistol belonging to the appellants as no pistol was recovered from them on their arrest and as such these pieces of circumstantial evidence are of no consequence.**

59. The JIT reports were exhibited however the evidentiary value of a JIT report is no more than a Section 173 Cr.PC report as was held in the case of **Province of Punjab v Muhammed Rafique** (PLD 2018 SC 178). As conceded by each member of the JIT's who gave evidence PW 20 Omar Shahid, PW 21 Mazhar Iqbal and PW 26 Babar Bakhel these JIT reports only represented their **opinions** and were based only on the material before them which had already been uncovered and as such these JIT reports are of no assistance to the prosecution. A JIT report is no more than an opinion of an IO and is not proof of any fact in terms of evidence before the trial court as only the court can determine guilt or innocence. In this respect reliance is placed on the case of **Muhammed Idress** (Supra) and as such the trial court erred in law on relying on such reports in convicting the appellants.

60. The question of absconsion of any of the appellants even if this was the case will not improve the prosecution case in the absence of any other incriminating evidence as in this case as it only adds suspicion to the prosecution case which does not amount to guilt especially if no Section 87 and 88 Cr.PC procedures are carried out against any of the accused as in this case. In this respect reliance is placed on the cases of **Adnan Hussain** (Supra), **Khan Mir** (Supra) and **Rahimullah Jan** (Supra).

61. We also find that the prosecution has failed to prove beyond a reasonable doubt any offences under Section 201/202 PPC as it appears that there was no mens rea to mislead or misguide any one and both the APG and learned counsel for the legal heirs have conceded to this position and as such the appellants are acquitted of this charge.

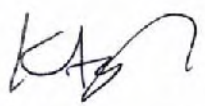
62. That the appellants are entitled to the benefit of the doubt as a matter of right as opposed to concession and in this case as mentioned above we have found many doubts concerning the appellant's involvement in the murder of the deceased. In this respect reliance is placed on the case of **Tariq Pervez V/s. The State** (1995 SCMR 1345).

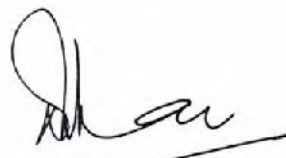
In conclusion.

63. For the reasons mentioned above all the appellants are acquitted of the charge, the impugned judgment is set aside and the appellants shall be released unless wanted in any other custody case.

64. The appeals are disposed of in the above terms.

INCED IN OPEN COURT ON 21-11-2022


Mr. Muhammad Karim Khan Agha


Mr. Justice Arshad Hussain Khan