JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE.

(JUDICIAL DEPARTMENT)

CRIMINAL APPEAL No.73676 of 2022.
Muhammad Rehmat Ullah
Vs.
The State etc.

JUDGMENT

DATE OF HEARING: 13.06.2023.

APPELLANT BY: M/s. Mudassar Naveed Chatha and Mukhtar Ahmed Awan, Advocates.

STATE BY: Rai Akhtar Hussain Kharal, Additional Prosecutor General.

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MUHAMMAD AMJAD RAFIQ, J:- Muhammad Rehmat Ullah (appellant) faced trial in case FIR No.04/2022 under sections 11-F(2),11-G,11-W and 8/9 of Anti-terrorism Act, 1997 registered at police station CTD, Gujranwala, and vide judgment dated 08.11.2022 the learned Judge, Anti-terrorism Court, Gujranwala Division convicted and sentenced him under following sections of Anti-terrorism Act, 1997:-

> *Rigorous Imprisonment for 04 months with fine of Rs.10,000/-, in default whereof to further undergo SI for one month* ***[Section 11-F (2)]***
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> *Rigorous Imprisonment for 02 years with fine of Rs.10,000/-, in default whereof to further undergo SI for one month.* ***[Section 11-W]***
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> *Rigorous Imprisonment for 02 years with fine of Rs.10,000/-, in default whereof to further undergo SI for one month.* ***[Section 11-G]***
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> *Rigorous Imprisonment for 02 years with fine of Rs.10,000/-, in default whereof to further undergo SI for one month.* ***[Section 8/9]***
>
> It was ordered that all the sentences shall run concurrently and benefit of Section 382-B Cr.P.C. was extended to him.

2. Prosecution mania conjures the appellant with strings of allegations as set out in complaint (Ex.PC) lodged by Abdul Jabbar 616 Corporal, the complainant; it speaks that on 18.03.2022 during a

routine round-up, a contingent of CTD fully armed, on an official vehicle, when present at Akaal garh moor, Bismillah chowk, Ada Domala, Pasroor-Narowal Road, received an information at about 10:10 a.m. from a stool-pigeon through WhatsApp that a person belonging to a banned organization "*Al-Qaida*", while present at Sadwala Oncha Chowk, Zafarwal, Narowal Road, Tehsil and District Narowal is distributing banned books, magazines and stickers for propagation of his banned organization. On his lead, a raid was conducted where two persons were found present, out of whom, one was distributing magazines and other was the recipient, who succeeded to flee up, while distributor was apprehended at the spot who disclosed his name as Muhammad Rehmat Ullah (accused/appellant). On his personal search, following articles/documents were recovered;

> One photocopied bound set of book titled as "*Shaheed Usama Sehra Say Samundar Tak*" wrapped in blue polythene bag, already banned vide Notification No. SO(IS-III)6-15/2010/pt-I dated 21.08.2015; three magazines titled "*Nawaye-Afghan Jahad*" (March 2019), "*Sharaq Say Gharb Tak*" "*Yeh Saleebi Jang Hai*" containing hate material. Seven stickers of banned organization "*Al-Qaida*" with printed words "Al-Qaida" on one side whereas "Kalma Tayyaba" on the other and underneath "Qiyam-ay-Khilafat ka aik he tareeka" (Jahad Fe Sabelillah). Mobile phone Realme Model-RMX-2020 along with two SIM Cards, found containing hate and terrorism related material; another mobile phone Nokia Model TA-1034 with one SIM card along with cash amount Rs.3200/- and one bus ticket. Complainant secured all above in four sealed parcels.

3. After completion of usual investigation, report under section 173 Cr.P.C. was submitted in Court against the accused/appellant. He was charge sheeted, to which he pleaded not guilty and claimed to be tried. Prosecution during trial produced witnesses namely Azam Mehmood 201 Corporal, Nasir Mehmood SI, Abdul Jabbar 616 Corporal, Shahid Mahmood 1103 Corporal, Yasir Ali 1078 Corporal, Nasir Mahmood Hunjra Inspector and Muhammad Azam Inspector who were recorded as PW-1, PW-2, PW-3, PW-4, PW-5, PW-6 and PW-7 respectively. On close of prosecution case, the accused/appellant was examined under section 342 Cr.P.C. who denied the prosecution evidence, however, opted to produce in his

defence USB Ex.DA containing two clips of CCTV footage regarding his lifting from Madrissa but did not opt to appear in the witness box in terms of Section 340(2) Cr.P.C. and on conclusion of trial he was convicted and sentenced forecited.

4. Heard. Record perused.

5. Prosecution side riding was on the shoulders of two witnesses of recovery PW-3 & PW-4 who narrated the story like one mentioned in the complaint/FIR. According to them, they left the Police station at 7:00 a.m. on 18.03.2022 for roundup and took more than 3 hours & 10 minutes to reach at Akaal garh moor at 10:10 a.m. where they received information about the presence of accused at Zafarwal Chowk; however, they rushed to the destined place where the accused was present. Both with little variation stated about the distance inter se the place of information and the recovery as 4/5 & 5/6 kilometers. It is observed that prosecution has not produced any rupt or proof for leaving of police station by the CTD team at an acclaimed time so as to show the purpose or destination they were going to and that too far away from police station. After apprehending the accused at 10:20 a.m. they took two hours to complete all the processes at the site including drafting of complaint which the PW-3 specifically deposed as under;

> "I completed draft of complaint at 12.20 pm, I sent the same through Asif Iqbal 627 Corporal to Police Station for registration of FIR"

It is noticed that police station was at a distance of 80 Kilometers from the place of recovery and FIR was registered at 1:45 p.m. within almost 1 hour and 25 minutes if it is presumed that said Asif Iqbal swiftly left the place of recovery at 12.20 p.m. but there is nothing to presume because Asif Iqbal Corporal did not enter appearance in the dock to verify the facts. We have noticed that earlier this distance of 80 kilometers was covered by the CTD raiding team in 3 hours 10 minutes, despite the fact they went straight to Akaal garh moor and did not stop anywhere as per statement of PW-3 & PW-4. In such

circumstances to know the condition of road and means of transportation which Asif Iqbal used for reaching to the police station, his testimony was essential; therefore, his nonappearance is fatal to the prosecution case as held in case reported as "*MINHAJ KHAN Versus The STATE*" (**2019 SCMR 326**).

6. During search of accused no material was collected which could label him as member of banned organization; this has been conceded by PW-3 & PW-4 in their depositions while stating that no membership card was recovered from his possession. Similarly, PW-6 investigating officer also admitted that neither any organizational card was recovered nor any thing on the lead of accused. Though PW-6 claimed to have made an attempt to join the people from the locality where allegedly accused was living and deposed that no one came forward due to his being member of banned organization; but neither he named any person nor statement of any such person was recorded in whose presence he had made such attempt. Though CDR of accused was also brought on record but no suspicious number was tracked to show his link with banned/proscribed organization. Investigating officer also admitted that he inspected the place of recovery but nothing like CCTV was found. He claimed to have associated the nearby shopkeepers for knowing the name of deserted unknown accused but no material he could collect in this respect; but again, name of shopkeeper was not deposed by him nor indicated a reference from any investigative material in this context. We are fortified in our view that no material was available in support of charge u/s 11-F (2) of Anti-terrorism Act, 1997.

7. Before dilating upon the main issues, it is essential to observe that Prosecution story for distribution or dissemination of hate material could not be materialized or proved through any cogent or supportive evidence because the recipient, probably an imaginary person, ran away from the scene of crime and he was imaginary in the sense that no person was arrested later during investigation nor was taken into

the process; therefore, imagination or presumption that appellant was in the pocket of that allegation is nothing but farce.

8. The first and foremost consideration requisite for charging standard of prosecution was the recovery of one banned book and three magazines mentioned in the complaint Exh.PC and were shown exhibited before the court as “P1 & P2/1-3” but the book and magazines are not available in the record before this court which is to be responded by the prosecution yet we have found that except this nominal information, neither the title-images of such book or magazines are part of record nor observation of the court that after seeing the original, the book and magazines were returned to the prosecution because of being banned or containing hate material. So much so no witness deposed before the court about the contents of such book or magazines referring any chapter or pages showing a cause of banning. Therefore, we simply rule out this nominal evidence from consideration which could not connect the appellant with commission of offence.

9. Learned Additional Prosecutor General raises his stance at a high pitch while referring that the fact of possession alone is sufficient to convict the accused and it is not necessary to give evidence that he actually disseminated the material. Confronted with the situation that articles recovered from the possession of accused are not available in the court, he responded that marking of documents as “P” clearly indicates that they were exhibited before the court and presumption of truth attaches to judicial functions under Article 129 illustration (e) of Qanun-e-Shahadat Order, 1984 and further states that accused has not cross-examined the witness in whose evidence such articles were exhibited in the Court, therefore, the principle that any fact deposed during examination-in-chief if not cross examined by the accused would be presumed as admitted and proved. Carefully attended above contentions which require thorough response and clarification.

10. It was the case of prosecution that accused/appellant was apprehended at the moment when he was distributing banned books to an individual who ran away on seeing the CTD raiding team. From his search, banned book & magazines (P1 & P2/13)), stickers (P3/1-7), mobile phone (P4) along with SIM Cards (P5/1-2), another mobile (P6) along with SIM (P7), Cash (P8/1-6), Bus ticket (P9) and Polythene shopping bag (P10) were recovered and taken into possession while securing them into four sealed parcels. All these articles P1 to P10 are missing from the record. We have examined the record of trial court which is with page marking and no jump of page number has been observed. All other documents are available on the record including CDR, Chat history of mobile phone in the form of USB Exh. PR/1 and scanned copies which were retrieved by the PFSA allegedly from the mobile phones recovered from the accused; PFSA report is also available except documents P1 to P10. We asked from the learned APG for such record, he expressed his inability about presence of such record. Had it been available in the court it must have been sent to this court along with all other record. For reference a para from Chapter 24-B of High Court Rules & Orders Volume-III is referred;

> **43. Exhibited articles-** Exhibited articles, which are not documents and are not referred to in paragraphs 41 and 42 of this Chapter, should not be sent to the High Court, unless the High Court calls for them, or unless the Sessions Judge considers that a particular exhibit will be required in the High Court, in which case he should record a note at the foot of his judgment that the exhibit should be forwarded to the High Court in the event of an appeal.

The above dictates of law requires that the documents exhibited must be sent to the court of appeal with records. We have observed that all the articles including mobile phone recovered from the accused were containing information, therefore, fall within the definition of document; however, for clarity definition of document as mentioned in Article 2(1)(b) of Qanun-e-Shahadat Order, 1984 is reproduced as under;

> (b) "Document" means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of

> those means, intended to be used, or which may be used, for the purpose recording that matter;
>
> **Illustrations**
> A writing is a document;
> Words printed, lithographed or photographed are documents;
> A map or plan Is a document;
> An inscription on a metal plate or stone is a document;
> A caricature is a document.

Similarly, an electronic document as defined in Electronic Transaction Ordinance, 2002 means;

> (m) "electronic document" includes documents, records, information, communications or transactions in electronic form;

The definition of 'document' in our law is the "matter expressed or described upon any substance" and not the substance itself, therefore information in the form of writing, words painted, map or plan, inscription or caricature etc. when appear on a substance would qualify to be a document which means book in bound set is not the document but the information therein. The word 'document' as a verb means *"a process of recording the details of an event"*. Articles cited above shown exhibited as P1 to P10 were the documents on the qualification of containing information supportable to prosecution case. But certainly, the hypothesis of mis-exhibition is stronger due to their non-availability in the record and mechanically marking them with letter "P" without clarification as to whether they were produced singly or in sealed parcels because as per statement of Complainant PW-3 that he secured all the documents/articles in four sealed parcels. This fact gets further strength when it is not in the evidence of any witness that after de-sealing said four parcels the cited articles were produced before the Court. Although learned trial Court has not forwarded the documents P1 to P10 to this Court along with the record but at the same time it has also not mentioned in the judgment that such articles are being retained by the Court at its level or to any other destination. Yet another fact was also observed by this Court that prosecution has attached a USB with the record as Ex.PR/1 containing images of some material extracted from mobile phones of

accused which means that when USB can be sent with the record, documents P1 to P10 if available could have easily been tagged or sent with the record. We have also examined two reports u/s 173 Cr.P.C. available in the record which according to its column No. 5 speak about availability of case property as per details of documents attached with the reports. At the end of both reports in details of documents we have not found mentioned any of the documents like P1 to P10.

So far as the contention that judicial function are protected as having presumption of truth, suffice it to say that such presumption falls under Article 129 of Qanun-e-Shahadat Order, 1984, it says that 'Court may presume' which means that it is optional with the court to presume or not to presume because it is not like rebuttable presumption as of some referred under Article 90 to 95 & 99. Such Articles use word "shall" for presumption of facts mentioned therein, therefore, if facts are not rebutted, shall be presumed as in existence. Presumption under Article 129 of the said Order is also not like irrebuttable presumptions (conclusive) as referred in Article 55 and 128 of the said Order. We therefore, in the circumstance do not presume that such documents were ever produced before the learned trial Court. Therefore, prosecution case fails due to non-production of primary or secondary evidence in the form of documents in support of oral assertions. Prosecution has also not produced the material thing (mobile etc.) before the Court which was in the form of indirect evidence, nor trial Court required its production which is in complete defiance to proviso (2) of Article-71 of Qanun-e-Shahadat Order, 1984 which says;

> Provided further that, if oral evidence refers to the existence or condition of any material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection:

11. As a legal challenge we turn to the contention of learned APG that fact of alleged non-exhibition of documents has not been challenged during recording of evidence, therefore, any fact if not

cross examined shall be presumed as admitted or proved. We know that principles of evidence in criminal matters stand at variance or at different premise to one applied in civil matters. In a situation like above, the Honourable Supreme Court has clarified the principles of evidence in criminal matters in a case reported as "*Mst. ASIA BIBI Versus The STATE and others*" **(PLD 2019 Supreme Court 64)** as under:-

> 19. The argument of the learned counsel for the complainant that some factual assertions made by the prosecution witnesses were deemed to have been admitted by the defence because the prosecution witnesses were not cross-examined regarding those assertions and no suggestion was put to them regarding incorrectness of such assertions has been found by me to be misconceived. In the case of Nadeem Ramzan v. The State (2018 SCMR 149) this Court had clarified while referring to the earlier cases of S. Mahmood Alam Shah v. The State (PLD 1987 SC 250) and State v. Rab Nawaz and another (PLD 1974 SC 87) that "the principle that a fact would be deemed to be proved if the witness stating such fact had not been cross-examined regarding ***the same was a principle applicable to civil cases and not to criminal cases.*** It was held that a criminal case is to be decided on the basis of totality of impressions gathered from the circumstances of the case and not on the narrow ground of cross-examination or otherwise of a witness on a particular fact stated by him."
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> **(Emphasis supplied)**

In the light of above dictum, it can safely be concluded that prosecution evidence is bereft of exhibition of very basic documents to prove the possession of same with the accused/appellant; therefore, when there is no hate material or the stickers of banned organization on the record, conviction on charges u/s 11-G, 11-W or 8/9 does not sustain.

12. Prosecution's stance that if the documents were not exhibited in the evidence during the trial, criminal liability of accused/appellant can still be proved through material extracted or retrieved from mobile phone recovered from his possession on the day of raid. We have examined the material placed on record as well as PFSA report with respect to extraction of such material from the mobile phones; so much so prosecution has also attached with the record a USB Exh.PR/1 allegedly containing images, audios, videos, chat, call log etc., retrieved from the phone. This evidence cannot be used against

the accused due to the reason that images P12/1-10 retrieved from mobile phone were not put to the accused in his statement u/s 342 Cr.P.C., and USB Ex.PR/1 was not played in the Court during the statement of any witness so as to prove its contents. We are also seriously concerned about extraction of data from a personal mobile phone, may be of an accused, without her consent; which is not a good practice as it opposes to constitutional guarantee of right to privacy and we feel that if the accused was not ready to accord consent, then at least permission from magistrate should have been taken. Though in this case, Anti-terrorism Court supervised the processes of investigation whenever needed but we have not found any such permission in the record nor Learned APG has shown the same to us, therefore, retrieval of data from mobile phone of accused/appellant by PFSA without the consent of accused amounts to self-incrimination prohibited under Article-13 of the Constitution of the Islamic Republic of Pakistan, 1973, therefore, such evidence is ruled out from consideration.

13. Extracting information from a personal phone of accused during a criminal process is a serious issue which attracted our attention to examine the law on the subject. In this modern day, we are virtually living in our cell phones, chatting with our nears and dears, talking through audio or video calls, sharing material in public and private, passing messages, throwing information, pasting advertisements and storing images, audios-video clips, subject information and what not, therefore, our phone is like or not less than a home. Every relation domestic or private which the people keep within four walls of their house is legally protected under the Constitution, that is the reason dignity of a man and, subject to law, the privacy of home is inviolable right of every individual as per Article 14 (1) of the Constitution of the Islamic Republic of Pakistan, 1973. We know that the human inclinations have no limits, it expands to religion, Sufism, ideology, politics, art, culture, customs, traditions, literature, music, Poetry, history, business, sports etc., anything can appeal to an individual in

whose pursuit it explores books, knowledge vents like public libraries, websites on Google, Face book, U-tube, Twitter, correspondence with scholars etc., and such exploration of physiological knowledge is not prohibited under the law. Reason flies beyond comprehension, institutionalized processes and worldly scheme of avenues; it struggles, unless it is settled to an acquiesced concept of understanding. Until then if any information which the person wants to keep secret in his cell phone cannot be extracted except with his consent or as the law directs because privacy of home is subject to law as reflected from Article 14 above; therefore, if his limits or collection of information are against the law of land, then he can well be restricted through the process of law. As a fundamental constitutional right, the right to privacy is meant to take precedence over any other inconsistent provisions of domestic law. Article 8 of the Constitution provides that "any law, or any custom or usage having the force of law, in so far as it is inconsistent with the rights conferred under the Constitution, shall, to the extent of such inconsistency, be void." Article 8 (5), furthermore, states that "the rights conferred by this Chapter shall not be suspended except as expressly provided by the Constitution."

14. Pakistan is a signatory to several international and regional instruments with privacy implications, including:

- The International Covenant on Civil and Political Rights (signed April 2008, ratified June 2010). Article 17 of the ICCPR states that "no one shall be subject to arbitrary or unlawful interference with his privacy, family or correspondence." The ICCPR also commits Pakistan to ensuring the protection of other rights that rely on the protection of privacy, such as freedom of expression and freedom of association.

- The Cairo Declaration on Human Rights in Islam (signed August 1990). Article 18 of the CDHRI affirms that: "a) Everyone shall have the right to live in security for himself, his religion, his dependents, his honor and his property. (b) Everyone shall have the right to privacy in the conduct of his private affairs, in his home, among his family, with regard to

his property and his relationships. It is not permitted to spy on him, to place him under surveillance or to besmirch his good name. The State shall protect him from arbitrary interference. (c) A private residence is inviolable in all cases. It will not be entered without permission from its inhabitants or in any unlawful manner, nor shall it be demolished or confiscated and its dwellers evicted."

- The Convention on the Rights of the Child (ratified November 1990). Article 16 of the CRC states that "1) No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation. 2) The child has the right to the protection of the law against such interference or attacks."

15. A number of laws regulate communications surveillance, acquisition of data and protection thereof in Pakistan, some of which are cited herein below with required expression relevant to the case in hand;

The Investigation for Fair Trial Act, **2013**

This Act allows for access to data, emails, telephone calls, and any form of computer or mobile phone-based communication, subject to a judicial warrant. However, a warrant can be requested wherever an official has ‘reasons to believe’ that a citizen is, or is ‘likely to be associated’ with, or even ‘in the process of beginning to plan’ an offence under Pakistani law.

The Pakistan Telecommunication (Re-organization) Act, **1996.**

32. Warrants for search.— (1) Where on information furnished by the Authority or Board, the Court has reason to believe that any unlicensed telecommunication system, wireless telegraphy apparatus or unapproved terminal equipment or unapproved crypto apparatus is being kept or concealed or any unlicensed telecommunication service is provided, or any licensed service is being used against the interest of national security and public safety it may issue a search warrant; and the person to whom such warrant is directed, may enter the premises, vessel, aircraft, or hovercraft or place where such telecommunication system, wireless telegraphy apparatus or terminal equipment or crypto apparatus is allegedly kept or concealed or unlicensed telecommunication service is provided or any licensed service being used against the interest of national security and public safety therefrom carry out search and inspection thereof and seize such telecommunication

system, wireless telegraph apparatus or terminal equipment or crypto apparatus

The Prevention of Electronic Crimes Act, **2016**

The Act contains a number of sections related to data privacy. However, these are intended to grant law enforcement and other government entities access to the private data of citizens, or to restrict citizens from gaining access to government data. Sections 3, 4, 5, 6, 7 and 8 make it a crime for anyone to gain unauthorized access to any information system or data, or copying or transmission of critical infrastructure data, punishable with a prison sentence up to 3 months to seven years or a fine of up to fifty thousand to 10 million rupees.

Section 31 allows a law enforcement officer to require a person to hand over data without producing any court warrant if it is believed that it is "reasonably required" for a criminal investigation. This can be done at the discretion of the officer and needs only be brought to the notice of a court within 24 hours after the acquisition of the data. Section 32 requires telephone and Internet service providers to retain traffic data for at least one year. Law enforcement bodies can demand access to that data subject to a warrant issued by a court. Section 33 allows courts to issue a warrant to a law enforcement officer to search and seize any data that "may reasonable be required" for a criminal investigation. In cases involving the vaguely defined "cyberterrorism", the officer can search and seize the data without a warrant and notify the court within 24 hours of its seizure.

Section 35(2)(b) requires that law enforcement officers carrying out a search and seizure "take all precautions" to maintain the secrecy of the seized data and not interfere with any data not related to the crime being investigated.

Section 39 permits for real-time collection and recording of information for a criminal investigation if a Court is satisfied on the basis of information furnished by an authorized officer.

Section 42 allows the government to share any data obtained from its investigation with any foreign government or international agency.

The Freedom of Information Ordinance, **2002**

According to section 17 of the Freedom of Information Ordinance, "Privacy and personal information", certain forms of "information is exempt if its disclosure under this ordinance would involve the invasion of the privacy of an identifiable, individual (including individuals) other than the requester."

All above references of law clearly speak that the acquisition of data stored in an information system or seizure of any articles containing such data requires intervention of Court either by obtaining warrant in this respect or otherwise an intimation to the Court after such seizure within 24 hours. Therefore, when any mobile phone is recovered from a suspect, and any data retrieval whereof from said phone is essential for criminal investigation, it could only be obtained with the permission of concerned Court with strict regard to privacy rights guaranteed under the Constitution.

16. Let's see it with another angle that if any information is required to be extracted from a mobile phone recovered from an accused at the time of his arrest while considering it an article, then what is the process which regulates its use or disposal. Law suggests that such article is directed to be kept in safe custody; relevant section of Cr.P.C. is reproduced as under;

> **51. Search of arrested persons:** Whenever a person is arrested by a police-officer under-a warrant which does not provide for the taking of bail or under a warrant, which provides for the taking of bail but the person arrested cannot furnish bail, and
>
> whenever a person is arrested without warrant, or by a private person under a warrant, and cannot legally be admitted to bail, or is unable to furnish bail.
>
> The officer making the arrest or, when the arrest is made by a private person, the police officer to whom he makes over the person arrested, *may search such person and place in safe custody all articles*, other than necessary wearing apparel, found upon him.
>
> **(Emphasis supplied)**

The disposal of articles recovered on search is regulated under section 523 of Cr. P.C which is as follows;

> **523. Procedure by police upon seizure of property taken under Section 51 or stolen:** (1) The seizure by any police officer of property taken under Section 51, or alleged or suspected to have been stolen, or found under circumstances which create suspicion of the commission of any offence ***shall be forthwith reported to a Magistrate who shall make such order as he thinks fit respecting the disposal of such property*** or the delivery of such property to the person entitled to the possession thereof, or if such person cannot be ascertained, respecting the custody and production of such property.

> **(2) Procedure where owner of property seized unknown**: If the person so entitled is known, the Magistrate may order the property to be delivered to him on such conditions (if any) as the Magistrate thinks fit. If such person is unknown, the Magistrate may detain it and shall, in such case, issue a proclamation specifying the articles of which such property consists, and requiring any person who may have a claim thereto, to appear before him and establish his claim within six months from the date of such proclamation.
>
> **(Emphasis supplied)**

The above provision makes it clear that for any property recovered on search u/s 51 of Cr.P.C. an appropriate order can only be made by magistrate concerned. This situation requires that Police officer if wanted to use such mobile/cell phone can request the magistrate for its analysis in support of allegation in the FIR, and magistrate after hearing the accused can pass order for examination and extraction of such information which is relevant to the case only, keeping strict regard to Article 14 of the Constitution of the Islamic Republic of Pakistan, 1973

17. A long history for tracking the infringement of privacy rights through cell phones has its roots in American jurisprudence, however, the relevant case laws best suited to present case are referred as under;

***Riley v. California*, 573 U.S. 373 (2014)**

In this case, David Leon Riley while under a charge for shooting on rival gang, when arrested while driving on a vehicle, two guns were also found. Police also took into possession the cell phone from his pocket wherein some videos showing his connection withs gangs were watched and used in the trial, upon which jury convicted him for all three offences.

> Question; was the evidence admitted at trial from Riley's cell phone discovered through a search that violated his Fourth Amendment right to be free from unreasonable searches?

United States v. Wurie, 2014

Boston police officers arrested Brima Wurie in 2007 for distributing crack cocaine. Among the items confiscated from Wurie was his cell phone, which rang repeatedly while he was detained. Without

obtaining a warrant, officers looked through the phone's call log, and with that information, determined the address of a residence where they found drugs, a firearm, and ammunition.

> Question; was in this case was whether the Fourth Amendment permits the police, without obtaining a warrant, to review the call log of a cellphone found on a person who has been lawfully arrested.

Fourth Amendment referred in above questions was in fact the Fourth Amendment (1791) to the Constitution of the United States of America, that forbids unreasonable searches and seizures of individuals and property. The text of amendment is follows;

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The amendment was Introduced in 1789; the principle that, within reason, "every man's house is his castle," and that any citizen may fall into the category of an accused to whom protections ought to be provided accordingly. In U.S. Constitutional law, the Fourth Amendment is the foundation of criminal law jurisprudence, articulating both the rights of persons and the responsibilities of law-enforcement officials.

The Supreme Court finally tackled a privacy matter related to a cellphone in a unanimous single decision for above two cases i.e., ***Riley v. California &*** **United States v. Wurie, 2014**; the Court held that generally police cannot, without a warrant, search the digital contents of a cellphone of someone they arrested. Chief Justice John Roberts wrote:

> "The United States asserts that a search of all data stored on a cell phone is 'materially indistinguishable' from searches of these sorts of physical items. ... That is like saying a ride on horseback is materially indistinguishable from a flight to the moon. Both are ways of getting from point A to point B, but little else justifies lumping them together. Modern cell phones, as a category, implicate privacy concerns far

> beyond those implicated by the search of a cigarette pack, a wallet, or a purse. A conclusion that inspecting the contents of an arrestee's pockets works no substantial additional intrusion on privacy beyond the arrest itself may make sense as applied to physical items, but any extension of that reasoning to digital data has to rest on its own bottom. ...
>
> "Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans 'the privacies of life'... The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought. Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple — get a warrant."
>
> **(Emphasis supplied)**

This precedent also reinforced the obtaining of warrant before extracting any information from a cell phone.

18. In United States of America it is thought that our lives are on our phones, making them a likely source of evidence if police suspect commission of a crime and there are myriad ways law enforcement can obtain that data, both externally and from the phone itself. Therefore, in USA, the **Electronic Communications Privacy Act of 1986** (ECPA) was introduced which dictates what law enforcement must obtain direction in the form of a subpoena, court order, or warrant, depending on what it's looking for. Such law was enacted in the light of **Fifth Amendment** in the Constitution of USA (1791) which reads as under;

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

Fifth amendment prohibits, compelling for answer to a capital charge, self-incrimination, double jeopardy, deprivation to life, liberty and

property, and protection of private property. If a question affecting any right, protected under Fifth amendment, arises during the criminal proceedings, it is avoided by the accused while using the words “I plead the Fifth”. Extracting data from a phone colours the testimony, in such case, as revealing the contents of one’s own mind which amounts to self-incrimination. Therefore, civil rights advocates say that the government can’t force anybody to tell them phone’s password. However, information collected from cell phone of an accused if reveals something the government already knew, and the government can prove that prior knowledge, then no question of self-incrimination arises and it is well known as **“the foregone conclusion exception”.**

19. By concluding above discussion, it could be said that our digital belongings i.e., phone, SIM, SD card data could have been copied and gone through; our phone may have been turned on, apps and browsers opened; the police might have access to any accounts our phones logged into. This means they may have read personal communication, noted personal accounts including email addresses, social media account names to follow, sent messages or made posts using our log in. Depending upon the circumstances of the arrest and the method of seizure of mobile device, we are subject to a certain set of rights, laws, or protections. In USA, it is the right of every person to decline the warrantless search of his mobile phone, if he is arrested or taken into police custody; he should verbally state that he does not consent to a search of his devices. A law enforcement agency is only permitted to conduct a warrantless search of his device if a compelling case for an emergency can be made.

20. The prohibition ensured and guaranteed through Fourth and Fifth Amendments in Constitution of USA as highlighted in preceding paragraphs includes self-incrimination; therefore, giving consent for acquisition or extraction of data from your cell phone by the law enforcing agencies during investigation of a case amounts to self-

incrimination. Our system too identifies same principles of protection like in USA. Such prohibition and protections are embodied in Articles 9, 12, 13, 14, 24 of the Constitution of the Islamic Republic of Pakistan, 1973. Article 13 of the Constitution prohibits self-incrimination which is reproduced as under;

Protection against double punishment and self-incrimination

13. No person—

(a) shall be prosecuted or punished for the same offence more than once; or

(b) shall, when accused of an offence, be compelled to be a witness against himself.

Above expression in Article 13(b) clearly indicates that no one can be compelled to be witness against himself; thus, offering your mobile phone for scrutiny can incriminate you for any offence, because it is not expected that everything you have stored in your phone by consent or was it downloaded systemically without the consent must be fresh in your memory. This offer amounts to self-incrimination which has been prohibited under the Constitution. As observed above Article 8 of the Constitution provides that "any law, or any custom or usage having the force of law, in so far as it is inconsistent with the rights conferred under the Constitution, shall, to the extent of such inconsistency, be void." Article 8 (5), furthermore, states that "the rights conferred by this Chapter shall not be suspended except as expressly provided by the Constitution. As per existing law if any data in cell phone is showing any crime link, that can be looked into in order to attend any emergent situation but then such inspection must be brought to the notice of Court concerned within 24 hours. On the spirit of Article 13 & 14 of the Constitution of the Islamic Republic of Pakistan, 1973, it is, therefore, held that spying over or extracting data from a personal phone of an individual or suspect is unconstitutional and illegal except with the permission of Court concerned. Any violation may entail punishment under the statutory law.

21. Coming back to the case, the totality of circumstance as discussed above indicate only one irresistible conclusion that the panorama of prosecution case theory is not confidence inspiring; thus, prosecution has failed to prove the charge against the appellant beyond shadow of reasonable doubt. Above submission finds support from the judgments reported as "*The State through P.G. Sindh and others vs. Ahmed Omar Sheikh and others*" **(2021 SCMR 873)** and "*Najaf Ali Shah vs. The State*" **(2021 SCMR 736)** wherein Supreme Court of Pakistan has held that for extending benefit of doubt it was not necessary that there should be many circumstances, if there was only one doubt, the benefit of same must go to the accused; therefore, in the given circumstances, **Crl. Appeal No.73676 of 2022** filed by the accused/appellant is **ALLOWED**, the conviction and sentence of the appellant is set-aside and he is acquitted of the charge by extending the benefit of doubt. He is in custody; he be released forthwith if not involved in any other criminal case. The case property, if any, be disposed of in accordance with law and record of the learned trial court be sent back immediately.

(Ali Baqar Najafi)
Judge.

(Muhammad Amjad Rafiq)
Judge.

APPROVED FOR REORTING

(Ali Baqar Najafi)
Judge.

(Muhammad Amjad Rafiq)
Judge.

This judgment was pronounced on 13.06.2023, however, after dictation and preparation it was signed on 14.07.2023.

Jamshaid*