IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:
Mr. Justice Anwar Zaheer Jamali
Mr. Justice Asif Saeed Khan Khosa
Mr. Justice Amir Hani Muslim

Criminal Appeals No. 13, 14, 15 & 16 of 2004 and 53 of 2011
(Against the judgment dated 18.02.1999 passed by the Lahore High Court, Lahore in Criminal Appeal No. 322 of 1991, Criminal Revisions No. 82 of 1992 & 178 of 1993 and Murder Reference No. 499 of 1991)

Hassan	*(in Cr. A. 13 of 2004)*
Sher Muhammad	*(in Cr. A. 14 of 2004)*
Sher Muhammad	*(in Cr. A. 15 of 2004)*
Sikandar, etc.	*(in Cr. A. 16 of 2004)*
Muhammad Hashim, etc.	*(in Cr. A. 53 of 2011)*

... Appellants

versus

The State	*(in Cr. A. 13 of 2004)*
Ghulam Qadir	*(in Cr. A. 14 of 2004)*
Abdul Ghaffar	*(in Cr. A. 15 of 2004)*
The State	*(in Cr. A. 16 of 2004)*
The State	*(in Cr. A. 53 of 2011)*

... Respondents

For the Appellants:	Sardar Muhammad Latif Khan Khosa, Sr. ASC *(in Cr. A. 13 & 16 of 2004)* Sh. Zamir Hussain, Sr. ASC *(in Cr. A. 14 & 15 of 2004 & Cr. A. 53 of 2011)*
For the State:	Mr. Ahmed Raza Gillani, Additional Prosecutor-General, Punjab *(in all cases)*
For respondents No. 1 to 3:	N.R. *(in Cr. A. 14 of 2004)*
For respondents No. 1 to 5:	N.R. *(in Cr. A. 15 of 2004)*
On Court's Notice:	Mirza Waqas Rauf, Additional Advocate-General, Punjab Syed Arshed Hussain Shah, Additional Advocate-General, KPK

Mr. Naseer Ahmed Baugulzai, Additional Advocate-General, Balochistan

Dates of hearing: 30.05.2013 & 31.05.2013

JUDGMENT

Asif Saeed Khan Khosa, J.: Leave to appeal had been granted by this Court in this case on 06.02.2004 and the order passed in that regard reads as follows:

> "These petitions for leave to appeal have been filed against the judgment dated 18th February 1999 passed by Lahore High Court, Lahore in Cr. A. 322/91, Cr. R. 82/1992 & Murder Reference No. 499 of 1991.
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> 2. Facts in brief leading to filing of above noted petitions are that an occurrence had taken place on 13th June 1986 at about 2.30 p.m. in the area of Mustafa Abad about 12 miles from Police Station Luddan of District Vehari, a complaint in respect whereof was lodged by Muhammad Iqbal to the effect that he is a resident of Mustafa Abad and is a cultivator. On the day of occurrence he was returning home from Melsi in Jeep alongwith Mushtaq (deceased), Farrukh Mahmood (deceased), Ghulam Haider (deceased), Mohammad Yaqoob (PW-13) and Muhammad Nawaz (PW-10). When they reached near the Bhaini of Faqir Muhammad Arain suddenly firearm shots were fired at their Jeep as a result of which the front left tyre got punctured and even number of bullets had hit the Jeep at which Mushtaq (deceased) stopped the Jeep and all the occupant of the said Jeep came out of the same and started running to save their lives. The complainant also hid himself under the Jeep. He also added that he saw Sikandar armed with a .303 rifle, Manik armed with a .12 bore gun, Abdul Ghaffar also armed with a local gun, Khuda Bukhsh, Zahoor, Ghulam Qadir, Bahadur, Abdul Ghaffar son of Shahamand, Hashim, Qasim and Shahamand armed with hatchets and Hakim and Sultan armed with 'Daangs' sitting in the ambush. At a Lalkara raised by these accused persons, Sikandar appellant fired a shot which hit the face of Mushtaq deceased who was followed by Hassan appellant who fired a shot which landed on the front right chest of Farrukh deceased and who was then followed by Khuda Bukhsh appellant who inflicted a hatchet blow on the head of Ghulam Haider deceased whereafter the assailants armed with firearms resorted to indiscriminate firing as a result of which Mushtaq, Farrukh, Ghulam Haider, Nawaz and Yaqoob fell down injured. The complainant had further alleged that Khuda Bukhsh, Zahoor, Ghulam Qadir, Bahadur, Abdul Ghaffar, Hashim and Qasim then inflicted hatchets blows on the person of Farrukh deceased and Nawaz and Yaqoob P.Ws. The complainant had further disclosed that Mushtaq, Farrukh and Yaqoob P.Ws had received serious injuries on their persons. The complainant had also mentioned that in the meantime Mushtaq Ahmad Inspector (PW.18) had reached the spot hearing the report of firearms and had apprehended Sikandar, Bahadur, Zahoor and Abdul Ghaffar and Yaqoob accused at the place of occurrence alongwith their respective weapons of offence, whereas the other

accused made their escape good. Motive behind the occurrence was stated as in the year 1983, a sister's son of Sikandar, namely Dur Muhammad Khand was murdered and the two brothers of Mohammad Iqbal complainant namely Mushtaq (deceased) and Gulzar were accused of the said murder out of whom Mushtaq deceased had secured his acquittal. This, according to complainant, induced the members of Khand brotherhood to launch an attack on the complainant party and about the grievance of the members of the Arain brotherhood amongst the accused persons, it was mentioned that in a land dispute, the complainant party used to help one Allah Ditta Arain while Shahamand accused and other Arain accused persons used to oppose him. On completion of usual investigation all the accused persons were sent up to face trial. As they did not plead guilty to the charge read over to them, therefore, prosecution led evidence to substantiate accusation against them. Learned trial Court vide its judgment dated 21st October 1991, after having gone through the evidence and hearing both the sides, acquitted Manik, Abdul Ghaffar son of Khuda Bukhsh, Yaqoob, Shahamand, Hakim and Sultan, whereas convicted Sikandar, Hassan, Khuda Bukhsh, Bahadur, Ghulam Haider, Zahoor, Hashim, Qasim and Abdul Ghaffar son of Shahamand. Upon their conviction under Section 148 PPC each of them was sentenced to undergo one year R.I. Pursuant to their conviction under Section 307/149 PPC each of them was sentenced to suffer seven years R.I. with fine of Rs.1000/- each or one year R.I. and in case of default in payment of fine to undergo further R.I. for one year. Accused Sikandar, Hassan and Khuda Bukhsh were further convicted under Section 302/149 PPC and sentenced to death whereas remaining accused namely Bahadur, Ghulam Qadir, Zahoor, Hashim, Qasim and Abdul Ghaffar son of Shahamand were sentenced to undergo imprisonment for life. On the murder charge each of them was also punished with a fine of Rs.15000/- or in default whereof to undergo two years R.I. They were also directed to pay Rs.15000/- each as compensation to the legal heirs of the deceased or to undergo six months R.I. in default thereof. Feeling dissatisfied all the accused persons approached to the Lahore High Court, Lahore by filing appeals. A murder reference was also sent by the trial Court for confirmation or otherwise of death sentence awarded to three accused, Sher Muhammad, Abdur Rab and Mohammad Yaqoob, being dissatisfied from acquittal of accused Manik, Abdul Ghaffar son of Khuda Bukhsh, Mohammad Yaqoob, Shahamand and Sultan accused. Sher Mohammad, Abdur Rab and Muhammad Yaqoob also filed appeal. Learned High Court, after having gone through the entire evidence produced by the parties, vide judgment dated 18th February, 1999, maintained the conviction/sentence of accused Sikandar, Hassan, Khuda Bukhsh, Bahadur, Zahoor and Hashim but acquitted Ghulam Qadir, Qasim and Abdul Ghaffar for giving them benefit of doubt. As such Criminal Petition No. 147-L and 168-L of 1999 have been filed by accused Hassan, Sikandar and Khuda Bukhsh against their conviction and sentence whereas Criminal Petitions No.156-L and 157-L of 1999 have been filed by Sher Mohammad against acquittal of Ghulam Qadir etc. and Abdul Ghaffar etc.

3. We have heard learned counsel for the parties and have also gone through the material available on record carefully. In our opinion petitioners Sikandar son of Allah Bukhsh, Khuda Bakhsh son of Allah Ditta and Hassan son of Shahamand have made out a case for grant of leave to appeal for the purpose of reappraisal of evidence in the interest of justice particularly in view of the fact that some of the accused who were apprehended at the spot alongwith accused Sikandar have been acquitted of the charge either by the trial Court or by the High Court, whereas

he has been convicted for the offence charged against him. It is to be seen that main reason prevailed upon the learned trial Court and High Court to found him guilty for the commission of the offences is that a .303 rifle was recovered from his possession which otherwise could not be treated as crime weapon in absence of recovery of bullets of .303 and positive firearms expert report. Similarly so far as the case of Khuda Bukhsh petitioner is concerned, he was stated to be arrested on 16th June 1986 as per statement of PW-Muhammad Saadullah Khan but incriminating crime weapon was recovered from him on 5th June 1986, much beyond the period of police remand thus, prima facie, his involvement in the commission of offence has become doubtful. Likewise no incriminating article has been recovered from accused Hassan but without any corroboration he has been convicted.

4. As far as petitions filed by the complainant against acquittal of the respondents Ghulam Qadir, Qasim and Abdul Ghaffar are concerned, questions involved in these petitions are required to be examined in depth for the purpose of safe administration of justice as it has been pointed out that some of the accused were apprehended at the spot and crime weapons were also recovered from them but they have been acquitted of the charge, therefore, in these petitions as well, leave to appeal is granted.

5. Office is directed to issue bailable warrants of arrest of respondents Ghulam Qadir, Qasim and Abdul Ghaffar in the sum of Rs. 100,000/- (Rupees one lac) returnable to the District and Sessions Judge, Vehari.

6. In pursuance of our earlier order dated 5th March 2002, office has submitted a report that no Jail Petition has been filed by Zahoor, Bahadur and Hashim. However, office is directed to send a letter to the Superintendent New Central Jail, Multan with direction to him to inquire from the convicts as to whether they have filed any Jail Petition or not. If any Jail Petition had been filed by them and is pending for decision, office may fix the same alongwith criminal appeals arising out of above noted criminal petition on an early date."

On 06.03.2008 when these appeals were fixed for regular hearing this Court had passed the following order:

"The convicts in these appeals are in jail for the last about twenty-two years and are in death cell waiting for the fate of their appeals for the last about seventeen years.

2. This Court in Abdul Malik and other Vs. The State and others (PLD 2006 SC 365) in the light of principle of double punishment in terms of the mandate of the Constitution, held that the imposition of sentence of death notwithstanding the period of detention in jail, is not in conflict to the concept of protection against double punishment in terms of Article 13 of the Constitution and may not be a consideration to withhold the death penalty.

3. The question which arises for the essential consideration, is that detention in jail as condemned prisoner for a long period without disposal of appeal is not rigorous of imprisonment in addition to the substantive sentence of death awarded to a

> convict and is not in conflict to the spirit of Article 13 of the Constitution. The second limb of the question requiring consideration, is whether non-disposal of cases involving death penalty within the statutory period or at-least in reasonable time is not denial of the right of access to justice and fair treatment in terms of fundamental right of a person.
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> 4. We find that the above right of condemned prisoners, has not been considered in the judgment referred to above in consequence to which the question as to whether the execution of sentence of death awarded to a convict after he had undergone the rigorous of life imprisonment in jail as condemned prisoner is in consonance to the spirit of Article 13 read with Article 9 of the Constitution, would essentially need examination. In view thereof, we deem it proper to send this matter to the Hon'ble Chief Justice of Pakistan for constitution of larger Bench for examination of the above question, which was not as such considered in *Abdul Malik and others Vs The State and others* (PLD 2006 SC 365).
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> 5. The matter is of a great public importance, therefore, we deem it proper to direct that the learned Attorney General for Pakistan, learned Advocate Generals of Provinces and also learned Prosecutor Generals of the Provinces will assist the Court. We also request Syed Sharif-ud-Din Pirzada, learned Sr. ASC, Mr. Khalid Anwar, learned Sr. ASC, Syed Abdul Hafeez Pirzada, learned Sr. ASC to assist the Court in the matter as amicus curiae.
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> 5-A. The learned counsel for the appellants has requested that the convicts in the present appeal and such other appeals are in jail since long therefore, the Hon'ble Chief Justice of Pakistan may be requested for a direction for early fixation of all such cases together before the proposed Bench. The request being genuine, the Hon'ble Chief Justice of Pakistan may consider the same in the larger interest of justice."

None of the learned *amici curiae* has entered appearance at the time of final hearing of these appeals and we have heard elaborate arguments advanced by the learned counsel for the convicts-appellants, the learned counsel for the complainant, the learned Additional Prosecutor-General, Punjab appearing for the State, the learned Additional Advocate-General, Punjab, the learned Additional Advocate-General, Khyber Pakhtunkhwa and the learned Additional Advocate-General, Balochistan and have gone through the record of the case with their assistance.

2. The case in hand pertains to an alleged murder of three persons and causing of hurt to some others in Mauza Mustafa Abad situated within the area of Police Station Luddan, District Vehari and FIR No. 131 was registered in that regard at Police Station Luddan, District Vehari on the same day at 04.35 P.M. for

offences under sections 302/307/148/149/379, PPC. After a full-dressed trial the learned Additional Sessions Judge, Vehari conducting the trial acquitted Manik, Abdul Ghaffar son of Khuda Bakhsh, Yaqoob, Shahamand, Hakim and Sultan accused *vide* judgment dated 21.10.1991 whereas through the same judgment he convicted and sentenced Sikandar, Hassan, Khuda Bakhsh, Zahoor, Ghulam Qadir, Bahadur, Abdul Ghaffar son of Shahamand, Hashim and Qasim accused for various offences. Sikandar, Hassan, Khuda Bakhsh, Ghulam Qadir, Abdul Ghaffar son of Shahamand, Zahoor, Bahadur, Qasim and Hashim accused were convicted for an offence under section 148, PPC and were sentenced to rigorous imprisonment for one year each. Sikandar, Hassan, Khuda Bakhsh, Zahoor, Ghulam Qadir, Bahadur, Abdul Ghaffar son of Shahamand, Hashim and Qasim accused were also convicted on three counts of an offence under section 302, PPC read with section 149, PPC for causing the death of Mushtaq, Farrukh Mehmood and Ghulam Haider in prosecution of their common object. Sikandar, Hassan and Khuda Bukhsh accused were sentenced to death each on each count and to pay a fine of Rs. 15,000/- or in default of payment thereof to undergo rigorous imprisonment for two years each. They were also ordered to pay Rs. 15,000/- each to the heirs of the deceased on each count by way of compensation under section 544-A, Cr.P.C. or in default of payment thereof to undergo simple imprisonment for six months each on each count. The remaining convicts namely Zahoor, Ghulam Qadir, Bahadur, Abdul Ghaffar son of Shahamand, Hashim and Qasim were sentenced to imprisonment for life each on each count and to pay a fine of Rs. 15,000/- each on each count or in default of payment thereof to undergo rigorous imprisonment for two years each on each count. They were also ordered to pay a sum of Rs. 15,000/- to the heirs of the three deceased by way of compensation under section 544-A, Cr.P.C. or in default of payment thereof to undergo simple imprisonment for six months each on each count. The learned trial court further convicted Khuda Bakhsh, Zahoor, Ghulam Qadir, Abdul Ghaffar son of Shahamand, Bahadur, Hashim, Qasim, Sikandar and

Hassan accused for an offence under section 307, PPC read with section 149, PPC and sentenced them to undergo rigorous imprisonment for seven years each and to pay a fine of Rs. 5,000/- each or in default of payment thereof to undergo rigorous imprisonment for one year each. The learned trial court had ordered that the sentences of imprisonment passed against the convicts under sections 148/307/149, PPC would run concurrently and the benefit under section 382-B, Cr.P.C. would be extended to the convicts. All the nine convicts challenged their convictions and sentences before the Lahore High Court, Lahore through Criminal Appeal No. 322 of 1991 which was heard along with Murder Reference No. 499 of 1991 seeking confirmation of the sentences of death passed by the learned trial court and Criminal Revision No. 82 of 1992 filed by a member of the complainant party seeking enhancement of the sentences of imprisonment for life passed against six convicts to death and Criminal Revision No. 178 of 1993 filed by a member of the complainant party seeking setting aside of the acquittal of those accused persons who had not been convicted by the learned trial court. A learned Division Bench of the Lahore High Court, Lahore decided all the above mentioned matters on 18.02.1999 through a consolidated judgment whereby the sentences of death passed by the learned trial court against Sikandar, Hassan and Khuda Bakhsh convicts were upheld and confirmed, the sentences of imprisonment for life passed by the learned trial court against Bahadur, Zahoor and Hashim convicts were maintained but it was ordered that their sentences of imprisonment for life would run concurrently and the sentences of imprisonment passed against six convicts on two counts of an offence under section 307, PPC read with section 149, PPC were also upheld and the same were also ordered to run concurrently. The extension of the benefit under section 382-B, Cr.P.C. by the learned trial court to all the convicts ordered to undergo sentences of imprisonment was affirmed by the learned Division Bench. The learned Division Bench, however, set aside the convictions and sentences of Ghulam Qadir, Qasim and Abdul Ghaffar son of Shahamand convicts and they were acquitted of the charge. The

Murder Reference was answered accordingly and both the revision petitions filed by the complainant party were dismissed. Hence, the present appeals by leave of this Court granted on 06.02.2004.

3. Criminal Appeal No. 53 of 2011 has been filed before this Court by Muhammad Hashim, Bahadur and Zahoor convicts who had been sentenced by the learned trial court to imprisonment for life each on three counts of the charge of murder and their convictions and sentences had been upheld by the Lahore High Court, Lahore. The learned counsel for the appellants has pointed out that the said convicts-appellants have already served out their sentences in their entirety and they have already been released from the jail. He has, thus, submitted that he does not press this appeal any further. Criminal Appeal No. 53 of 2011 is, therefore, dismissed as having not been pressed.

4. Criminal Appeal No. 13 of 2004 has been filed before this Court by Hassan convict who had *inter alia* been sentenced to death on three counts of a charge of murder and his sentences of death had been confirmed by the Lahore High Court, Lahore. Criminal Appeal No. 16 of 2004 has been filed before this Court by Sikandar and Khuda Bakhsh convicts who had also *inter alia* been sentenced to death each on three counts of a charge of murder and their sentences of death had also been confirmed by the Lahore High Court, Lahore. We have been informed that Khuda Bakhsh appellant has already died and, thus, his appeal has abated and for this reason the learned counsel for the convicts-appellants has pressed Criminal Appeal No. 16 of 2004 only to the extent of Sikandar appellant. Criminal Appeal No. 14 of 2004 has been filed by a member of the complainant party seeking setting aside of the acquittal of Ghulam Qadir, Qasim and Abdul Ghaffar son of Shahamand accused who had been convicted by the learned trial court but were acquitted by the Lahore High Court, Lahore. Finally, Criminal Appeal No. 15 of 2004 has also been filed by a member of the complainant party seeking setting aside of the acquittal of Abdul Ghaffar son of Khuda Bakhsh, Manik,

Muhammad Yaqoob, Shahamand and Sultan accused who had been acquitted by the learned trial court and their acquittal had been upheld by the Lahore High Court, Lahore.

5. Taking the case of the convicts sentenced to death first, we note that Hassan convict is the appellant in Criminal Appeal No. 13 of 2004 and Sikandar convict is the only surviving appellant in Criminal Appeal No. 16 of 2004 and both the said appellants had *inter alia* been convicted by the learned trial court on three counts of a charge of murder and had been sentenced to death each on each count. After making a feeble attempt at arguing their case on the merits the learned counsel for the said appellants has submitted that he shall mainly concentrate on seeking reduction of the said appellants' sentences of death to imprisonment for life in view of some peculiarities of the case. In this context the learned counsel for the appellants has pointed out that according to the FIR itself and also according to the statements of the eyewitnesses produced by the prosecution it was the complainant party which had gone to the place of occurrence whereat the members of the accused party were already available and, thus, the case in hand could not be treated as a case of premeditation on the part of the accused party. He has also referred to the statements made before the learned trial court by Muhammad Saad Ullah Khan, Inspector/SHO (PW16) and Mian Mushtaq Ahmed, Inspector/SHO (PW18) who had categorically stated that the parties to this case had fought with each other and during such fight firing had been resorted to by both the parties. In this context the learned counsel for the appellants has drawn our attention to the FIR which mentioned that Mushtaq Ahmed deceased was carrying a rifle 7MM with him at the time of occurrence and the relevant Memorandum of Recovery showed that as many as twenty crime-empties of a rifle 7MM had been secured by the police from the place of occurrence. The learned counsel for the appellants has highlighted that according to the prosecution no accused person was armed with a rifle 7MM. He has also pointed out that although Sikandar appellant was allegedly armed with a rifle 303 yet no

crime-empty of a rifle 303 had been secured from the place of occurrence. The learned counsel for the appellants has, thus, maintained that the statements made by the above mentioned police officers regarding firing by both the parties at each other at the spot was a factor which established that the prosecution had suppressed the truth and the doubt created in that regard ought to be resolved in favour of the appellants at least by reducing their sentences of death to imprisonment for life. The learned counsel for the appellants has gone on to submit that neither Hassan appellant nor Sikandar appellant had caused any injury to Ghulam Haider deceased and, thus, the capital sentence passed against them even on that count of the charge was unwarranted. He has further submitted that both the convicts-appellants had fired at their victims only once and despite having an ample opportunity in that regard they had not repeated their fires which factor may also be relevant to the matter of their sentences. The learned counsel for the appellants has vehemently argued that both the said appellants have already undergone more than twenty-five years of imprisonment in connection with this case and, thus, if their sentences of death are upheld by this Court at this stage then the said appellants would be deemed to have been sentenced to death *and* imprisonment for life on each count of the charge of murder whereas the provisions of section 302(b), PPC stipulate that a person found guilty of murder can be sentenced to death *or* imprisonment for life. According to the learned counsel for the appellants in such an eventuality the appellants would be justified in maintaining that two sentences have been passed against them for committing the same offence which would militate against the Fundamental Right guaranteed by the Constitution of the Islamic Republic of Pakistan, 1973 under Article 13(a) thereof. He has also invoked the provisions of section 403, Cr.P.C., the concept of double jeopardy and the principle of expectancy of life in support of this argument. He has also relied in this respect upon a recent unreported judgment handed down by a 5-member Bench of this Court on 09.05.2013 in the case of *Dilawar Hussain v. The State* (Criminal Review Petition No. 72 of 2007 in Criminal Appeal

No. 200 of 2003). With these submissions the learned counsel for the convicts-appellants has prayed that the sentences of death passed against Hassan and Sikandar appellants may be reduced to imprisonment for life on each count.

6. As against that the learned counsel for the complainant has vehemently argued that Hassan and Sikandar convicts-appellants have indeed undergone a period of custody which is more than a term of imprisonment for life but they have not spent that period in custody while undergoing any sentence of imprisonment for life and as a matter of fact and record they have spent that period in jail while waiting for exhaustion of their legal remedies and awaiting execution of their sentences of death. He has, therefore, maintained that the case in hand cannot be treated as a case of double jeopardy or double punishment so as to attract the provisions of Article 13(a) of the Constitution or of section 403, Cr.P.C. According to him the principle of expectancy of life already stands abandoned by this Court and, therefore, the same cannot be invoked in this case. During his submissions the learned counsel for the complainant has referred to the cases of *Vasanta v. State of Maharashtra* (AIR 1983 SC 361), *Sher Singh and others v. State of Punjab* (AIR 1983 SC 465) and *Khurram Malik and others v. The State and others* (PLD 2006 SC 354).

7. The learned Additional Prosecutor-General, Punjab appearing for the State has referred to the case of *Dila and another v. State of U.P.* ((2002) 7 Supreme Court Cases 450) wherein the Supreme Court of India had declined to reduce a convict's sentence leaving it to the State for taking a sympathetic view in the matter of the convict's sentence.

8. The learned Additional Advocate-General, Punjab appearing on the Court's notice has pointed out that the provisions of sections 497, 426 and 382-B, Cr.P.C. manifest that where the State fails in its duty to provide expeditious justice to an accused person or a convict there the law extends some favours to him and

grants him some relief in terms of bail or suspension of sentence on the statutory ground of delay in his trial or appeal or in terms of counting his period of imprisonment as an under-trial prisoner towards his sentence after conviction. He has submitted that the cases of *Abdul Malik and others v. The State and others* (PLD 2006 SC 365), *Abdul Haq v. Muhammad Amin alias Manna and others* (2004 SCMR 810), *Iftikhar Ahmed Khan v. Asghar Khan and another* (2009 SCMR 502), *Aga Dinal Khan v. Saffar, etc.* (NLR 2008 Criminal 280) and *Khurram Malik and others v. The State and others* (PLD 2006 SC 354) throw sufficient light on the issues involved in this case.

9. The learned Additional Advocate-General, Khyber Pakhtunkhwa has referred to the provisions of sub-section (5) of section 367, Cr.P.C. to maintain that the sentence of death is the normal punishment for an offence of murder and this Court may keep that in mind while considering the prayer made by the learned counsel for the convicts-appellants regarding reduction of the said appellants' sentences of death to imprisonment for life.

10. The learned Additional Advocate-General, Balochistan has maintained that the sentence of death and the sentence of imprisonment for life mentioned in section 302(b), PPC are alternative sentences and in a case where a convict sentenced to death undergoes a sentence equal to or more than a sentence of imprisonment for life while awaiting the outcome of his appeal then upholding his sentence of death by the appellate court would amount to sentencing the convict to death *and* imprisonment for life which would defeat the letter as well as the spirit of the provisions of section 302(b), PPC.

11. After hearing the learned counsel for the convicts-appellants, the learned counsel for the complainant, the learned Additional Prosecutor-General Punjab appearing for the State and the learned Additional Advocates-General, Punjab, Khyber Pakhtunkhwa and Balochistan appearing on the Court's notice and after attending to

the relevant facts of the case and the precedent cases cited before us we have straightaway found the learned counsel for the convicts-appellants to be somewhat justified in not seriously pressing the two appeals on the merits of the case because during the progress of the incident in issue the local police had reach the spot and Sikandar appellant had been arrested by the police at the spot with a firearm in his hands. The ocular account of the incident had been furnished by four eyewitnesses out of whom two had the stamp of injuries on their bodies to vouchsafe their presence at the scene of the crime at the relevant time. The motive set up by the prosecution had been admitted by the accused party in so many words and the same had provided corroboration to the ocular account. The medical evidence brought on the record had provided sufficient support to the ocular account. In these circumstances both the learned courts below, after assessing and evaluating the evidence in some detail, had concurred in their conclusion regarding the convicts-appellants' guilt. The version of the incident advanced by the accused party had been duly attended by the learned courts below and for cogent and valid reasons the same had been rejected by them. It could, therefore, not be urged before this Court with any degree of seriousness that the prosecution had not been able to prove its case against the convicts-appellants beyond reasonable doubt.

12. We have given serious and anxious consideration to the question of reduction of the sentences of death passed by the learned courts below against the convicts-appellants to sentences of imprisonment for life and have carefully examined all the submissions made before us in that regard from all the sides. We have found this to be correct that according to the prosecution's own case it was the complainant party which had gone to the place of occurrence whereat the accused party was already present and, thus, it could well be that it was not a case of any premeditation on the part of the accused party and the incident in issue could have taken place when the parties, otherwise inimical towards each other, had come face to face by way of a chance encounter. In

a case lacking malice aforethought on the part of the accused party and in a case of an occurrence developing at the spur of the moment this Court, depending upon the circumstances of the case, generally looks at the matter of sentence with some degree of empathy and consideration. It is also borne out from the record, particularly from the statements made before the learned trial court by Muhammad Saad Ullah Khan, Inspector/SHO (PW16) and Mian Mushtaq Ahmed, Inspector/SHO (PW18), that the case in hand was a case of a fight between the parties during which firing had been resorted to by both the parties. The FIR itself had mentioned that Mushtaq Ahmed deceased was carrying a rifle 7MM with him at the relevant time and during the spot inspection conducted by the police as many as twenty crime-empties of a rifle 7MM had been secured from the place of occurrence. It was not the case of the prosecution that any of the accused persons in this case was carrying or had used a rifle 7MM. The record further shows that although according to the prosecution Sikandar convict-appellant was carrying a rifle 303 at the relevant time yet no crime-empty of rifle 303 had been secured from the spot. The accused party had maintained before the learned trial court that the complainant party had aggressed against it which led to cross-firing between the parties but no independent evidence had been brought on the record by the accused party to support that stand taken by it. Be that as it may the fact remains that according to the investigating officers mentioned above, who were witnesses of the prosecution, there indeed took place cross-firing between the parties. It has already been observed by us above that it was the complainant party which had gone to the place of occurrence and in the occurrence that followed both the parties had fired at each other which makes it a case unsafe for conclusively holding that the appellants had committed the murders in issue with a predetermined mind and design. This aspect of the case, in its peculiar background, may call for withholding the extreme sentence of death. The learned counsel for the appellants is quite right in pointing out that Hassan and Sikandar appellants had not caused any injury to one of the murdered persons namely Ghulam

Haider and, thus, awarding them a sentence of death even on that count of the charge of murder appears to be rather excessive. It is also true that despite having an ample opportunity to cause more injuries to the complainant party by keeping on firing at it both the appellants namely Hassan and Sikandar had fired from their firearms only once causing one injury each to their victims. When incessant firing was taking place from both the sides, as is evident from the very large number of crime-empties secured from the place of occurrence, the said appellants could have fired more shots causing injuries to more persons of the opposite party but no such allegation had been levelled against them by the prosecution. This aspect of the case may also furnish some justification for reducing their sentences of death to those of imprisonment for life.

13. The record shows that the occurrence in this case had taken place on 13.06.1986 and soon after the occurrence both the convicts-appellants namely Hassan and Sikandar had been arrested by the local police. The said appellants were convicted and sentenced to death, etc. by the learned trial court on 21.10.1991 and during the trial they had remained on bail for about a couple of years. The said appellants are behind the bars continuously since 21.10.1991 and they are languishing in death-cells ever since, i.e. for a period of about twenty-two years. They had already spent about three years in jail as under-trial prisoners and if the remissions earned by them are to be counted towards their sentences then both of them have already spent more than twenty-five years in custody in connection with the present case. After recording of their convictions and sentences by the learned trial court in the year 1991 the appellants' sentences of death had been confirmed by the Lahore High Court, Lahore in the year 1999 and they had then approached this Court through Criminal Petitions in the year 1999 wherein leave to appeal was granted to them in the year 2004. Now after about fourteen years of their approaching this Court and after spending more than twenty-five years of their lives in custody, out of which period they have spent about twenty-two years in death-cells, the appellants' appeals have come up for

decision before this Court. The stark reality staring us in the face is that both the appellants have already spent in custody a period more than a full term of imprisonment for life and if we uphold their sentences of death at this late stage then the appellants would, for all practical purposes, be punished with death *after* spending a period in custody which is more than a full term of imprisonment for life and such a bizarre situation may run contrary to the letter and the spirit of section 302(b), PPC which provides for a sentence of death *or* a sentence of imprisonment for life. In the following paragraphs we proceed to examine this issue from all the diverse angles presented before us.

14. The issue involved here is simple and straightforward, i.e. if a person has been sentenced to death in a case of murder and during the pendency of his appeal before this Court his period of custody equals or exceeds a full term of imprisonment for life then can/should his sentence of death be maintained by this Court despite the fact that he has already served out one of the two legal sentences provided for in section 302(b), PPC. The learned counsel for the appellants maintains that in such a situation this Court cannot, and must not, affirm the sentence of death and may reduce the same to imprisonment for life. In support of his stand he has invoked the provisions of section 403, Cr.P.C., the concept of double jeopardy, the principle of expectancy of life and the Fundamental Right guaranteed by Article 13(a) of the Constitution of the Islamic Republic of Pakistan, 1973. We have attended to each of such aspects in some detail with reference to the relevant provisions and the precedent cases.

15. Section 403(1), Cr.P.C. provides as follows:

> "**403. Persons once convicted or acquitted not to be tried for the same offence.**
> (1) A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be **tried again** for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section

> 36, or for which he might have been convicted under section 237."
>
> (*bold letters have been supplied for emphasis*)

It is quite obvious from a plain reading of the said section that the principles of *autrefois acquit* and *autrefois convict* contained in section 403(1), Cr.P.C. forbid a *new trial* after a conviction or acquittal on the basis of the same facts has attained finality but it is equally obvious that the said principles have no application to the case in hand wherein holding of a new trial is not in issue. It is true that in the case of *Aziz Muhammad v. Qamar Iqbal and others* (2003 SCMR 579) a passing reference had been made to section 403, Cr.P.C. in the context of considering whether to enhance the sentence of a convict to death or not after he had already served out a legal sentence of imprisonment for life on a charge of murder but subsequently in the cases of *Abdul Malik and others v. The State and others* (PLD 2006 SC 365) and *Iftikhar Ahmed Khan v. Asghar Khan and another* (2009 SCMR 502) it had been clarified by this Court that the principles of *autrefois acquit* and *autrefois convict* contained in section 403(1), Cr.P.C. have no relevance to a case wherein the question under consideration in an appeal is not as to whether a new trial of the convict should be held or not but the issue is as to which sentence would be the appropriate sentence for a convict. It had been held by this Court in the case of *Abdul Malik and others v. The State and others* (PLD 2006 SC 365) that:

> "15. **When the conviction or acquittal of a person is under challenge in appeal or revision the proceedings are neither fresh prosecution nor there is any question of second conviction or double jeopardy**. It is by now a well settled principle of law that an appeal or revision is continuation of trial and any alteration of sentence would not amount to double jeopardy. In Kalawati and another v. The State of Himachal Pradesh AIR 1953 SC 131, the Court was called upon to comment on a similar question when it ruled in para. 9 of page 10 that, "---- an appeal against an acquittal wherever such is provided by the procedure is in substance a continuation of the prosecution"."
>
> (*bold letters have been supplied for emphasis*)

In the case of *Iftikhar Ahmed Khan v. Asghar Khan and another* (2009 SCMR 502) this Court had held as under:

> "9. In law, there are two legal maxims on this point:---
> (i) Autrefois acquit and autrefois convict (formerly acquitted and formerly convicted) and the other is,
> (ii) Nemo debet bis vexari pro una et eadem causa (It is a rule of law that a man shall not be twice vexed for one and the same cause):
> Principles of autrefois acquit and autrefois convict are incorporated in section 403 of the Criminal Procedure Code, 1898, which provides that persons once convicted or acquitted are not to be tried for the same offence. But this principle is not stricto sensu applicable to the facts and circumstances of the case in hand because convict is not being tried for the same offence again by any other Court as the present proceeding is, in fact, a continuation of the same proceeding which had commenced from the first Court. It is not a fresh or another round or trial of the proceeding against the accused after his conviction for the same offence."

We have, therefore, faced no difficulty in concluding that the provisions of section 403, Cr.P.C. are not attracted to the situation posed by the present case. The concept of double jeopardy is inseparably linked with the principles of *autrefois acquit* and *autrefois convict* and, thus, the said concept may also have little relevance to the case in hand.

16. The precedent cases in this country show that the principle of expectancy of life may be relevant to three situations, i.e. firstly, where an unconscionable delay is occasioned in final disposition of a legal remedy being pursued by a condemned prisoner where the undergone period of his incarceration is less than that of a term of imprisonment for life; secondly, where the State or the complainant party is seeking enhancement of a sentence of imprisonment for life of a convict to death and before or during the pendency of such recourse the convict has already served out his entire sentence of imprisonment for life and he has, or has not yet, been released from the jail; and thirdly, where a convict sentenced to death undergoes a period of custody equal to or more than a term of imprisonment for life during the pendency of his legal remedy against his conviction and sentence of death. Adverting to the first situation mentioned above we may observe that till about

a quarter of a century ago there was a general judicial trend to reduce a sentence of death of a convict on the charge of murder to a sentence of imprisonment for life if the convict had spent a long time in a death-cell awaiting confirmation or otherwise of his sentence of death by a High Court or affirmation of such sentence by this Court through deciding his appeal. Such reduction of sentence from death to imprisonment for life was based upon the principle of expectancy of life as throughout the period of his incarceration in a death-cell the convict was expecting that his life might be saved some day. In view of long delays in final disposition of such appeals, etc. on account of the ever increasing workload and in order to obviate miscarriage of justice through manoeuvred delays with the object of taking advantage of the principle of expectancy of life the judicial trend in this regard underwent a metamorphosis about a quarter of a century ago and the principle of expectancy of life *vis-à-vis* reduction of a sentence of death to imprisonment for life on the ground of delay was abandoned in this country. That changed approach, starting through the cases of *Muhammad Aman v. The State* (1987 SCMR 124) and *Maqbool Ahmad and others v. The State* (1987 SCMR 1059), continues to be followed till date as is evident from the cases of *Moahzam Shah v. Mohsan Shah and another* (1995 SCMR 1190), *Raheem Bakhsh v. Abdul Subhan* (1999 SCMR 1190), *Muhammad Hanif and others v. The State and others* (2001 SCMR 84), *Muhammad Aslam and others v. The State and others* (2001 SCMR 223), *Khurram Malik and others v. The State and others* (PLD 2006 SC 354) and *Agha Dinal Khan v. Saffar and others* (2008 SCMR 728).

17. As regards the second situation referred to above this Court has repeatedly held that in such a situation a sentence of imprisonment for life passed against a convict on a charge of murder may not be enhanced to death because after serving out a legal sentence on such a charge the convict has legitimately entertained an expectancy of life. This approach is manifested by the cases of *Mst. Razia Begum v. Jahangir and others* (PLD 1982 SC 302), *Mst. Promilla and others v. Safeer Alam and others* (2000

SCMR 1166), *Amir Khan and others v. The State and others* (2002 SCMR 403), *Aziz Muhammad v. Qamar Iqbal and others* (2003 SCMR 579), *Abdul Haq v. Muhammad Amin alias Manna and others* (2004 SCMR 810), *Abdul Malik and others v. The State and others* (PLD 2006 SC 365), *Haji Tahir Hussain v. Sqlain and others* (2008 SCMR 817) and *Iftikhar Ahmed Khan v. Asghar Khan and another* (2009 SCMR 502). In some of those cases while basing its judgment on the principle of expectancy of life this Court had also referred in passing to the provisions of section 403, Cr.P.C. and to the concept of double jeopardy but in the last mentioned case reliance had particularly been placed upon the provisions of Article 13(a) of the Constitution as well. The most elaborate judgment concerning this category of cases is that handed down by this Court in the case of *Abdul Malik and others v. The State and others* (PLD 2006 SC 365) and it was held and declared in that case as follows:

> "20. **There is no rule of general application that the serving out of sentence during the pendency of appeal or revision, by itself, would constitute a bar for enhancement of sentence or that any exercise to do that effect would be violative of Article 13 of the Constitution**. This could be one factor which the Court may consider, along with other factors and the principles referred to in para. 18 above, while deciding the question of enhancement.
>
> 21. We are mindful of the fact that this Court did not enhance sentence of convicts from life imprisonment to death who had already undergone the sentence in some cases. But the consideration of having already undergone the sentence was considered along with other circumstances in not enhancing the sentence and **in some cases there was an oblique reference to provisions of Article 13 of the Constitution**. A brief comment on those cases would be pertinent here:--
>
> ---
>
> An analysis of the afore-cited precedent case law of this Court would show that mostly there were multiple factors which weighed with the Court in not enhancing the sentence and the circumstance that a convict has already undergone the sentence also weighed with the Court. Reference to Article 13 of the Constitution as a ground was made in two cases only namely 2003 SCMR 579 and 2004 SCMR 810. In Muhammad Sharif supra (PLD 1976 SC 452), the Court did not lay down that enhancing the sentence would amount to second punishment for the same offence. Nevertheless, this Court in a subsequent case (PLD 1982 SC 302) while relying on the former judgment (Muhammad Sharif supra) observed that enhancing the sentence from life to death would have the effect of punishing the offender

> for the same offence again. The other cases namely 2003 SCMR 579, 2000 SCMR 1166 and 2004 SCMR 810 are the leave refusing orders and **there was neither any elaborate discussion nor adjudication with regard to the application of Article 13 of the Constitution in situations where the convict has already undergone the sentence of imprisonment during the pendency of appeal**. **In both these cases the judgment of this Court in Muhammad Ilyas v. Muhammad Sufian (2001 SCMR 465) (sic) was neither referred to nor discussed. In this case bar of Article 13 was pleaded by the convicted, but his sentence was enhanced to death, and this argument was repelled**. At para. 474 it was observed as under:--
>
> > "We are not persuaded to agree with learned ASC on behalf of the convict/respondent that the convict/respondent has already undergone the sentence awarded by the learned Appellate Court and accordingly at this belated stage the judgment of the trial Court could not be restored in view of the Doctrine of Expectancy of life for the reason that "as regards the doctrine of expectancy of life, in view of the chronic delays in committal, trial and disposal of appeals as also the deliberate tactics of the convicts to delay the proceedings in order to escape the gallows there has been a shift in the trend of this Court as adumbrated in its judgments in Asadullah Khan v. Muhammad Ali (1) Muhammad Khan v. Dost Muhammad (2) and Mst. Razia Begum v. Hijrayat Ali and 3 others (3) and the doctrine like that of falsus in uno falsus in omnibus is rarely and exceptionally invoked by this Court." (Muhammad Sharif v. Muhammad Javed PLD 1976 SC 452; the State v. Rab Nawaz and another PLD 1974 SC 87; Abdus Sattar v. Muhammad Anwar and 6 others PLD 1974 SC 266; Asadullah v. Muhammad Ali and 5 others PLD 1971 SC 541 and Mst. Nuran v. Nura and another PLD 1975 SC 174." (Emphasis is supplied).
>
> This judgment still holds the field and has not been re-visited."
>
> (*bold letters have been supplied for emphasis*)

We note that the above mentioned case of *Iftikhar Ahmed Khan v. Asghar Khan and another* (2009 SCMR 502) had been decided by a 3-member Bench of this Court whereas the afore-quoted case of *Abdul Malik and others v. The State and others* (PLD 2006 SC 365) had been decided by a 5-member Bench of this Court. In such a situation usually the view expressed by a Bench of greater numerical strength is to be followed even if its view was expressed prior in time to a different view expressed by a Bench of smaller numerical strength at some subsequent stage. What follows from the discussion made above is that in a case wherein the convict sentenced to imprisonment for life has already served out his

entire sentence of imprisonment for life there the Court may, in its discretion, not enhance his sentence of imprisonment for life to death and while considering the issue of such enhancement of sentence the Court may, as per the judgment rendered in the case of *Abdul Malik and others v. The State and others* (PLD 2006 SC 365), consider the provisions of Article 13(a) of the Constitution along with the other factors for deciding whether the sentence of imprisonment for life passed against the convict may be enhanced to death or not. Be that as it may this situation is not relevant to the appeals under consideration as the issue herein is not as to whether any convict's sentence of imprisonment for life may be enhanced to death or not.

18. This brings us to the third situation mentioned above regarding the principle of expectancy of life, i.e. where a convict sentenced to death undergoes a period of custody equal to or more than a term of imprisonment for life during the pendency of his legal remedy against his conviction and sentence of death. Such a case recently came up for hearing before a 5-member Bench of this Court and it was held by it that the convict had "acquired expectancy of life" and it reduced the sentence of death of the convict on the charge of murder to imprisonment for life. That was the case of *Dilawar Hussain v. The State* (Criminal Review Petition No. 72 of 2007 in Criminal Appeal No. 200 of 2003, decided on 09.05.2013). The relevant passages from the judgment delivered by this Court in that case are reproduced below:

> "8. Section 302(b) of Pakistan Penal Code provides only two sentences, one death sentence and the other imprisonment for life. In order to better appreciate the contention of the learned Counsel for the petitioner that only one sentence out of two would be awarded to the petitioner, provisions of section 302 PPC are reproduced below for facility of reference:-
>
> > "302. **Punishment of Qatl-i-amd –** Whoever commits qatl-i-amd shall, subject to the provisions of this Chapter be –
> > (a) punished with death as qisas;
> > (b) punished with death or imprisonment for life as ta'zir having regard to the facts and circumstances of the case, if the proof in either of

> the forms specified in section 304 is not available; or
> (c) punished with imprisonment of either description for a term which may extend to twenty-five years where according to the injunctions of Islam the punishment of qisas is not applicable.
> Provided that nothing in this clause shall apply to the offence of qatl-i-amd if committed in the name or on the pretext of honour and the same shall fall within the ambit of clause (a) or clause (b), as the case may be."

According to section 302(b) of the Pakistan Penal Code the person committing qatl-i-amd shall be punished with death or imprisonment for life as ta'zir having regard to the facts and circumstances of the case if the proof in either of the forms specified in section 304 PPC is not available. The counter argument raised by the learned counsel for the complainant that prolonged detention of the person convicted for an offence under section 302(b) PPC as a result of the delay in the conclusion of his trial and disposal of the appeal is not by itself sufficient to declare him entitled to the lesser penalty under section 302(b) PPC is nothing but departure from the intent of the legislature as the law itself has tackled the situation in which the Court has to select one out of the two sentences of the offence. ----------

9. ---------- **Even otherwise, it would be unjust to impose double sentence on the petitioner for commission of one offence as by keeping the accused in death cell for a period of 18 years, the delay in the disposal of his case being not at all attributable to him, it will be against the principle of natural justice that he is hanged by neck**. In this view of the matter, we are of the considered view that **such extenuating circumstances** do exist in the matter in the instant case for giving the benefit thereof to the petitioner. ----------

10. After having found in the scheme of criminal litigation that the **discretion** lies with this Court either to go for maintaining the sentences of death of the convict or to convert it into imprisonment for life, keeping in view the facts and circumstances of the case, we would have to first define the term 'life imprisonment' and have also to see whether such conversion would meet the ends of justice. ----------

11. In view of the afore-quoted provisions of law it is crystal clear as the light of day that life imprisonment mean twenty five years rigorous imprisonment. ---------- **In the instant case the petitioner is being incarcerated in the death cell for the last 17 years, one month and five days and by efflux of time he has also earned remissions for 18 years, eight months and ten days**. ----------

12. ---------- In the instant case the petitioner has not only served out one sentence provided under section 302(b) PPC but has also suffered the agonies of his remaining incarcerated in the death cell for a quite long period. In such circumstances, **while keeping in view the principle of abundant caution** we are of the considered view that the petitioner has made out a case for review of the earlier judgment of this Court.

13. The doctrine of expectancy of life has been dealt with in the case of ----------

> 14. Although the argument of the learned counsel for the complainant not to consider the doctrine of expectancy of life as a mitigating circumstance for lesser penalty, yet, the facts of the instant case are different from the aforesaid case as in that case the convict had not **undergone one of the two legal sentences provided under section 302 PPC** whereas in the instant case the petitioner having been incarcerated in the death cell for a quite long time of eighteen years and earning remissions almost for the same period **has acquired expectancy of life** for which he is entitled ----------. The aforesaid factors provide for mitigation for lesser penalty, as such, we, in the interest of justice, hold that the petitioner has been able to make out a case for lesser sentence."
>
> (*bold letters have been supplied for emphasis*)

In the present case the convicts-appellants have already spent about 22 years in death-cells and their total period of custody exceeds a full term of imprisonment for life each even if the remissions earned by them are not taken into consideration. The case of the present appellants is, therefore, a better case for reducing their sentences of death to imprisonment for life on the charges of murder than the case of the convict in the above mentioned judgment rendered by a 5-member Bench of this Court. In view of availability of that recent precedent withholding the benefit of the principle of expectancy of life from the appellants in the present case may be oppressive, if not unjust.

19. Now we turn to Article 13(a) of our Constitution which incorporates a Fundamental Right and reads as follows:

> "13. No person –
> (a) shall be prosecuted and punished for the same offence more than once; or
> (b) ----------"

The word "punished" appearing in the said Article cannot be lifted out of context or read in isolation and, to us, the words "prosecuted and punished" used therein are conjunctive and not disjunctive. We understand that all that the said provision of the Constitution does is to recognize the age-old maxims and jurisprudential principles of *autrefois acquit* and *autrefois convict* and to grant them the status of a Fundamental Right which right cannot be violated or abridged and against which no legislation can

be passed. We understand that in a case where a convict sentenced to death undergoes a period of custody equal to or more than a full term of imprisonment for life during the pendency of his legal remedy against his conviction and sentence of death the principle relevant to the question of reduction of his sentence of death to imprisonment for life would be that of expectancy of life along with the peculiar facts and circumstances of the case rather than the question of applicability or otherwise of Article 13(a) of the Constitution as the convict in such a case is neither to be prosecuted again nor punished again. The only issue involved in such a situation would be a possible variation of the sentence of the convict which is hardly relevant to the principles of *autrefois acquit* and *autrefois convict* meant by Article 13(a) of the Constitution to be elevated to the status of a Fundamental Right. We are of the considered view that a situation like this only involves issues of propriety of sentence and exercise of discretion by the court concerned in that regard and not an issue of any right, not to speak of a Fundamental Right, earned by a convict. We are, therefore, not surprised to notice that in the case of *Abdul Malik and others* *v.* *The State and others* (PLD 2006 SC 365) a 5-member Bench of this Court had refused to accept direct applicability of Article 13(a) of the Constitution to such a situation and later on in the case of *Dilawar Hussain* *v.* *The State* (Criminal Review Petition No. 72 of 2007 in Criminal Appeal No. 200 of 2003, decided on 09.05.2013) another 5-member Bench of this Court had not even deemed it necessary or relevant to refer to Article 13(a) of the Constitution while accepting the review petition and reducing the convict-petitioner's sentence of death to imprisonment for life *inter alia* on the ground that he had already spent a period of time in custody which was more than a term of imprisonment for life. In the latter case this Court had referred only to "natural justice", "extenuating circumstances", "abundant caution" and "expectancy of life" for reduction of the convict's sentence. In this background the reference made to and the reliance placed upon Article 13(a) of the Constitution by a 3-member Bench of this Court in the case of *Iftikhar Ahmed Khan* *v.*

Asghar Khan and another (2009 SCMR 502) in a similar context may be treated as *per incuriam*. While dwelling upon the issue of Fundamental Rights of a convict sentenced to death it may be interesting to mention here that in India the issue at hand was looked at from another angle and in the case of *T. V. Vatheeswaran v. The State of Tamil Nadu* (AIR 1983 SC 361(2)) it was declared by the Supreme Court of India that if the sentence of death passed against a convict on the charge of murder was not executed within a period of two years then the sentence of death ought to be quashed and reduced to imprisonment for life because such delay in execution of the sentence of death militated against the convict's Fundamental Right to life and liberty guaranteed by the Indian Constitution. The said judgment was, however, quickly overruled, and understandably so, by the Supreme Court of India in the case of *Sher Singh and others v. State of Punjab* (AIR 1983 SC 465).

20. The discussion made above shows that as of today the following principles of practice are being followed by the courts of this country in respect of the principle of expectancy of life:

(a) In a case where delay is occasioned in final disposition of a legal remedy being pursued by a convict sentenced to death on a charge of murder and where the undergone period of his incarceration is less than that of a term of imprisonment for life there the principle of expectancy of life for its use for the purpose of reduction of the sentence of death to imprisonment for life stands abandoned by the courts of this country.

(b) In a case where the State or the complainant party is seeking enhancement of a sentence of imprisonment for life of a convict to death and before or during the pendency of such recourse the convict serves out his entire sentence of imprisonment for life and he has, or has not yet, been released from the jail

there the principle of expectancy of life is still relevant for not enhancing the sentence of imprisonment for life to death. Article 13(a) of the Constitution is not directly relevant to such a situation but the spirit of that Article may be considered in such a case as a factor along with the other factors like expectancy of life and the facts and circumstances of the case, etc. for not enhancing the sentence of imprisonment for life to death at such a late stage.

(c) In a case where a convict sentenced to death undergoes a period of custody equal to or more than a full term of imprisonment for life during the pendency of his judicial remedy against his conviction and sentence of death there the principle of expectancy of life may be a relevant factor to be considered along with the other factors for reducing his sentence of death to imprisonment for life.

21. After attending to the mitigating circumstances available in the facts and circumstances of this case and after deliberating upon the issues concerning section 403, Cr.P.C., double jeopardy, expectancy of life and Article 13(a) of the Constitution we now proceed to briefly advert to some other submissions made before us. We note that by virtue of Article 37(e) of the Constitution it is a responsibility of the State to “ensure inexpensive and expeditious justice”. It is probably in this context that through the provisions of sections 497, 426 and 382-B, Cr.P.C. the legislature itself intends to provide some relief to an accused person or a convict in a criminal case if the State has not been able to fulfil its constitutional responsibility of providing him expeditious justice. If an accused person’s trial is not concluded within a specified period section 497, Cr.P.C. contemplates bail for him, if a convict’s appeal is not decided within a particular period section 426, Cr.P.C. provides for suspension of his sentence and release on bail and if a trial is unduly prolonged then section 382-B, Cr.P.C. makes it

possible that the period of detention of an accused person during the trial may be counted towards determination or calculation of his sentence of imprisonment passed after conviction. Applying the same standard or principle, it may not be unreasonable to conclude that where a convict sentenced to death on a charge of murder fails to obtain a final judicial determination *qua* validity of his conviction or desirability of his sentence of death for such a long time that his period of custody stretches to a period equal to or exceeding a full term of imprisonment for life, which is one of the two alternative legal sentences provided in section 302(b), P.P.C., there the State, acting through its judicial Organ, may acknowledge failure of its constitutional responsibility of ensuring expeditious justice and may exercise discretion in the matter of the sentence of such convict by reducing it from death to imprisonment for life. It has already been mentioned by us above that after recording of their convictions and sentences by the learned trial court in the year 1991 the appellants' sentences of death had been confirmed by the Lahore High Court, Lahore in the year 1999 and they had then approached this Court through Criminal Petitions in the year 1999 wherein leave to appeal was granted to them in the year 2004. Now after about fourteen years of their approaching this Court and after spending more than twenty-five years of their lives in custody, out of which period they have spent about twenty-two years in death-cells, the appellants' appeals have come up for decision before this Court. We have also observed above that the stark reality staring us in the face is that both the appellants have already spent in custody a period more than a full term of imprisonment for life and if we uphold their sentences of death at this late stage then the appellants would, for all practical purposes, be punished with death *after* spending a period in custody which is more than a full term of imprisonment for life and such a bizarre situation may run contrary to the letter and the spirit of section 302(b), PPC which provides for a sentence of death *or* a sentence of imprisonment for life. Such a case may not strictly be termed as a case of double punishment but it can more appropriately be called a case of an unconscionably delayed

punishment, delayed to such an extent that the punishment is aggravated beyond the contemplation of the relevant law itself. Upon the analogy of sections 497, 426 and 382-B, Cr.P.C. noted above the legislative intent may lean in favour of extending some relief to the appellants placed in such a predicament which is not of their own making and the least that this Court can do for them in such an unfortunate situation is to exercise its discretion in the matter of their sentences by reducing their sentences of death to imprisonment for life on the basis of the facts and circumstances of the case detailed above and also on the basis of the principle of expectancy of life. In the case in hand after committing the abominable crime of murder the appellants have been vegetating and rotting in death cells awaiting their execution for so long that they now appear to have become victims themselves, victims of a monumental systemic failure which the system must acknowledge and own and in return it should extend the appellants some respite or reparation.

22. We are, however, conscious of the ingenuity and craftiness of a human mind and it can be visualised by us that the observations made by us above may possibly be misused in future through clever machinations of a convict whose neck is on the line. We, therefore, make it clear that the observations made above shall not be applicable to any delay caused by the Executive in processing or deciding a condemned prisoner's mercy petition or in executing his sentence of death after his judicial remedies have been exhausted. The said observations shall also not be applicable to a case wherein the convict is himself demonstrably and significantly responsible for the delay occasioned in conclusion of his judicial remedies.

23. Upon the strength of the provisions of sub-section (5) of section 367, Cr.P.C. it has been maintained before us that the normal sentence for an offence of murder is death and while considering a prayer for reduction of a sentence of death passed against a convict this Court may remain mindful of that statutory

stipulation. We have found such a submission to be suffering from multiple misconceptions. Sub-section (5) of section 367, Cr.P.C. provides as follows:

> "(5) If the accused is convicted of an offence punishable with death, and the Court sentences him to any punishment other than death, then the Court shall in its judgment state the reason why sentence of death was not passed."

We have not been able to find anything in the said provision of law even hinting at the sentence of death being the normal sentence in such a case. Section 302(b), P.P.C. clearly provides for two alternative sentences, i.e. sentence of death or sentence of imprisonment for life for the offence of murder and it does not state that any one of those sentences is to be treated as the normal sentence. As a matter of fact section 302(b), P.P.C. itself mentions that any one of the two alternative sentences provided for therein is to be passed "having regard to the facts and circumstances of the case". There are cases wherein "the facts and circumstances of the case" do not warrant a sentence of death and what is required by sub-section (5) of section 367, Cr.P.C. is that such facts and circumstances of the case ought to be mentioned by the trial court in its judgment so that the higher Courts may straightaway become aware of the same while entertaining or deciding a challenge thrown again the trial court's judgment. We believe that the general misunderstanding or misconception about the true import of the provisions of sub-section (5) of section 367, Cr.P.C. entertained by the legal community, including the courts, in this regard needs to be removed and rectified. The other misconception about sub-section (5) of section 367, Cr.P.C. is that it is considered to be applicable to the entire hierarchy of criminal courts whereas that is not the case. Sub-section (5) of section 367, Cr.P.C. is placed in Chapter XXVI of Part VI of the Code of Criminal Procedure, 1898 and Part VI of the Code pertains only to 'Proceedings in Prosecutions' before a trial court. The matters pertaining to the appellate and revisional courts are provided for in Part VII of the Code and that Part of the Code does not contain any

provision akin or similar to that of sub-section (5) of section 367, Cr.P.C. It is, thus, evident that the requirements of sub-section (5) of section 367, Cr.P.C. are relevant only to a trial court and they have no application to an appellate or revisional court. The provisions of section 423(1)(b), Cr.P.C. unambiguously show that it is well within the powers of an appellate court seized of an appeal against conviction to reduce the sentence of a convict and the requirement relevant to a trial court, as contained in sub-section (5) of section 367, Cr.P.C., is not to be found in section 423(1)(b), Cr.P.C. The powers conferred upon a revisional court under sections 435 and 439, Cr.P.C. also clearly demonstrate that while exercising revisional jurisdiction a sentence can be reduced and, again, the requirement relevant to a trial court, as contained in sub-section (5) of section 367, Cr.P.C., is not to be found in sections 435 and 439, Cr.P.C. It, therefore, goes without saying that when an appellate or revisional court is considering a question of propriety or otherwise of a sentence passed against a convict the provisions of sub-section (5) of section 367, Cr.P.C. cannot be pressed into service before it and any question of the sentence of death being the normal sentence is hardly relevant before the appellate and revisional courts.

24. As a consequence of the discussion made above we have concluded that on account of the mitigating circumstances oozing out of the facts and circumstances of this case and also on account of the principle of expectancy of life the sentences of death passed against Hassan and Sikandar convicts-appellants on all the counts of murder contained in the charge framed against them ought to be reduced to imprisonment for life. Criminal Appeals No. 13 and 16 of 2004 are, therefore, partly allowed, the sentences of death passed against Hassan and Sikandar convicts-appellants on all the relevant counts of the charge are reduced to sentences of imprisonment for life and the remaining convictions and sentences of the said appellants are maintained. All the sentences of imprisonment passed against them shall run concurrently and they shall be extended the benefit under section 382-B, Cr.P.C.

Criminal Appeal No. 16 of 2004 has already abated to the extent of Khuda Bakhsh appellant who has died. Criminal Appeals No. 13 and 16 of 2004 are disposed of in these terms.

25. As far as Criminal Appeal No. 14 of 2004 is concerned we have observed that Ghulam Qadir, Qasim and Abdul Ghaffar son of Shahamand respondents had been acquitted by the Lahore High Court, Lahore on the grounds that none of them had been arrested at the spot; they were not saddled with any specific injury on the person of any of the victims; no independent corroboration was forthcoming to their extent; and, therefore, they were entitled to be acquitted by extending the benefit of doubt to them. We have noticed that the occurrence in this case had taken place in the year 1986 and the said respondents had earned their acquittal from the Lahore High Court, Lahore way back in the year 1999, i.e. about fourteen years ago. In this backdrop the learned counsel for the appellant has not pressed this appeal with any degree of vehemence. The reasons recorded by the Lahore High Court, Lahore for acquitting the said respondents have not been found by us to be fanciful or perverse. In these circumstances no occasion has been found by us for interference with the said respondents' acquittal. Criminal Appeal No. 14 of 2004 is, therefore, dismissed.

26. As regards Criminal Appeal No. 15 of 2004 we have noticed that Abdul Ghaffar son of Khuda Bakhsh, Manik, Muhammad Yaqoob, Shahamand and Sultan respondents had been acquitted by the learned trial court in the year 1991 and their acquittal had not been interfered with by the Lahore High Court, Lahore in the year 1999. It had been observed by the learned courts below that Manik, Abdul Ghaffar son of Khuda Bakhsh and Muhammad Yaqoob respondents had not been attributed any specific injury in the FIR but during the trial the prosecution witnesses had improved the version contained in the FIR and had attributed effective firing to them. It had also been noticed by the learned courts below that even Shahamand respondent had not been attributed any effective role in the FIR but the prosecution

witnesses had made improvements in that regard before the learned trial court and had alleged that he had played an active part in the incident. It had particularly been observed by the learned trial court that Shahamand and Sultan respondents were old and infirm persons and the allegations levelled by the prosecution against them were even otherwise difficult to be accepted at their face value. The learned counsel for the appellant has failed to point out any misreading or non-reading of the evidence on the part of the learned courts below and the reasons recorded by the learned courts below for recording acquittal of the said respondents have not been found by us to be arbitrary. In these circumstances there is hardly any occasion for us to interfere with acquittal of the said respondents. Criminal Appeal No. 15 of 2004 is, therefore, also dismissed.

27. These are the detailed reasons for the short order announced by us on 31.05.2013 which reads as follows:

> "After hearing the arguments of learned ASCs for the appellants, Additional Prosecutor-General, Punjab, Additional Advocate-Generals, Punjab, KPK and Balochistan Criminal Appeals No. 13 and 16 of 2004 are partly allowed to the extent that the sentences of death penalty awarded to the appellants Hassan and Sikandar are converted into imprisonment for life on each count which shall run concurrently. Further benefit under section 382-B, Cr.P.C. is also extended to them."
>
> 2. Criminal Appeals No. 14 & 15 of 2004 are dismissed. Criminal Appeal No. 53 wherein all the three convicts-appellants have already served out their entire sentences is dismissed as not pressed.
>
> 3. Reasons for this short order to follow separately."

Judge

Judge

Judge

Islamabad
31.05.2013
Approved for reporting.

Arif