Syed Hasan Azhar Rizvi, J. —Before I express my concurrence with the detailed opinion authored by *Mr. Justice Qazi Faez Isa*, Hon'ble Chief Justice of Pakistan, I find it imperative to pen down a few additional observations that resonate with the conclusions reached therein. While I fully agree with the reasoning except those mentioned in para 26 to 30 and the outcome of the detailed opinion, the significance of the issues presented before this Court compels me to elaborate on certain aspects that reinforce our collective judicial philosophy. The case at hand touches upon the intricate application of legal principles and reflects the broader constitutional ethos that guides our jurisprudence. It is with a deep sense of responsibility and a commitment to the rule of law that I concur with the conclusion of the detailed opinion. However, I believe that certain nuances warrant further emphasis to underscore the contours of our legal landscape and to provide clarity for future jurisprudence. In aligning with the detailed opinion, I am mindful of the weighty considerations that have been accurately analyzed by the Chief Justice. The legal discourse presented therein is both thorough and compelling, leaving little room for dissent. Yet, it is the hallmark of a robust judicial system to allow for the expression of supplementary views that may fortify the decision's legal foundation and contribute to the richness of our legal tradition. Therefore, in the spirit of judicial comity and to enhance the legal reasoning that forms the crux of opinion by this Court, I offer the following observations.

2. Before delving into the intricate details of the case, let us first provide a concise overview of the key facts and events that set the stage for this reference. Briefly, Mr. Ahmad Raza Kasuri got registered an F.I.R. No.402/74 dated 11.11.1974 for the offences under section 302/307 (now 324) of the Pakistan Penal Code, 1860 ('**P.P.C.'**), registered at Police Station ('**P.S.'**) Ichhra, District Lahore against some unknown accused persons for the murder of his father Mr. Muhammad Ahmad Khan ('**the deceased**'). Later on, seven persons (Mr. Zulfiqar Ali Bhutto ('**Mr. Bhutto**'), Masood Mahmood, Director General Federal Security Force ('FSF'), Mian Muhammad Abbas, Director FSF, Ghulam Hussain, Inspector FSF, Ghulam Mustafa, Inspector FSF, Arshad Iqbal, Sub-Inspector FSF and Iftikhar Ahmad, Assistant Sub-Inspector (FSF) were nominated and the offences under section 120-B/109 were also added in this case.

A Full Court comprising five judges of the High Court was constituted for the trial of this case. After the trial, all the accused persons (except Masood Mahmood and Ghulam Hussain) were convicted and sentenced to death, along with other punishments, as per the judgment dated 18.03.1978, reported as PLD 1978 Lah. 523, pp. 618-622. A criminal appeal filed against the decision of the High Court was dismissed by this Court vide judgment dated 06.02.1979, reported as PLD 1979 SC 53. The review petition filed by Mr. Bhutto was also dismissed by this Court vide judgment dated 24.03.1979, reported as PLD 1979 SC 741. Finally, Mr. Bhutto was executed on 04.04.1979.

3. Since Mr. Bhutto's execution, one of Pakistan's major political parties, the Pakistan People's Party (PPP), has consistently questioned the fairness of the judicial process, alleging that it was influenced by the then-military dictatorship as well as political factors and as such lacked impartiality. The party views the trial of Mr. Bhutto and his subsequent execution as a miscarriage of justice, which remains a sensitive issue in Pakistani politics. In 2011, this longstanding grievance prompted the then-President of Pakistan, Asif Ali Zardari ('**the President'**), who was also Bhutto's son-in-law, to file a presidential reference under Article 186 of the Constitution of the Islamic Republic of Pakistan (**'the Constitution**') to seek the opinion of the Court on the legality and fairness of the original proceedings that led to Bhutto's death sentence. The reference aimed to address and rectify any historical injustices and to restore public confidence in the judiciary's impartiality. The President sought the opinion of the Court on the following questions of law:

1. *Whether the decision of the Lahore High Court as well as the Supreme Court of Pakistan in the murder trial against Shaheed Zulfiqar Ali Bhutto meets the requirements of fundamental rights as guaranteed under Article 4, sub-Articles (1) and (2)(a), Article 8, Article 9, Article 10A / due process, Article 14, Article 25 of the Constitution of the Islamic Republic of Pakistan, 1973? If it does not, its effect and consequences?*

2. *Whether the conviction leading to execution of Shaheed Zulfiqar Ali Bhutto could be termed as a decision of the Supreme Court binding on all other courts being based upon or enunciating the principle of law in terms of Article 189 of the Constitution of the Islamic Republic of Pakistan, 1973? If not, its effects and consequences?*

3. *Whether in the peculiar circumstances of this case awarding and maintaining of the death sentence was justified or it could amount to deliberate murder keeping in view the glaring bias against Shaheed Zulfiqar Ali Bhutto?*

4. *Whether the decision in the case of the murder trial against Shaheed Zulfiqar Ali Bhutto fulfills the requirements of Islamic laws as codified in the Holy Quran and the Sunnah of the Holy Prophet (SAW)? If so, whether present case is covered by doctrine of repentance specifically mentioned in the following Suras of Holy Quran:*

   (a) *Sura Al-Nisa, verses 17 and 18; Sura AlBaqara, verses 159, 160 and 222; Sura AlMaida, verse 39; Sura Al-Aaraaf, verse 153; Sura Al-Nahl, verse 119; Sura Al-Taha, verse 82; as well as*

   (b) *Sunan Ibn-e-Maaja, Chapter 171, Hadith No. 395.*

5. *Whether on the basis of conclusions arrived at and inferences drawn from the evidence/material in the case an order for conviction and sentence against Shaheed Zulfiqar Ali Bhutto could have been recorded*?

4. On 06.03.2024, we unanimously rendered our short opinion (with reasons to be recorded later) on the aforementioned questions, whereby we refused to provide any assistance/opinion on questions No. 2 and 4. However, as regards questions No. 1, 3, and 5, we opined as follows:

<u>Opinion on Question No.1</u>

"(i) The proceedings of the trial by the Lahore High Court and of the appeal by the Supreme Court of Pakistan do not meet the requirements of the Fundamental Right to a fair trial and due process enshrined in Articles 4 and 9 of the Constitution and later guaranteed as a separate and independent Fundamental Right under Article 10A of the Constitution.

(ii) The Constitution and the law do not provide a mechanism to set aside the judgment whereby Mr. Bhutto was convicted and sentenced; the said judgment attained finality after the dismissal of the review petition by this Court."

<u>Opinion on Questions No.3 & 5</u>

"In its advisory jurisdiction under Article 186 of the Constitution, this Court cannot reappraise the evidence and undo the decision of the case. However, in our detailed reasons, we shall identify the major constitutional and legal lapses that had occurred with respect to fair trial and due process."

5. At the beginning of my note, I mentioned that, in principle, I concur with the conclusion reached in the detailed opinion rendered by the Chief Justice. However, certain areas related to constitutional and legal lapses in the case of Mr. Bhutto require further consideration and explanation keeping in view the scope and extent of authority of this Court in the advisory jurisdiction. Moreover, I disagree with specific observations made by the Chief Justice, as outlined in paragraphs 26 to 30 of the detailed opinion. Therefore, I will first highlight and explain the major constitutional and legal lapses that undermined the proceedings of trial of Mr. Bhutto before the High Court as well as the appeal filed by him before the Supreme Court of Pakistan, causing them to fail to meet the requirements of a fair trial and due process, as enshrined in Articles 4 and 9 of the Constitution. Secondly, I, with respect, outline the reasons for my disagreement with certain observations made by the Chief Justice in the detailed opinion. To avoid repetition, I will refer to the arguments presented by the legal representatives and counsel as outlined in the detailed opinion, except for those necessary for my analysis.

Right to due process and fair trial

6. At the time of the trial of Mr. Bhutto, the right to due process and a fair trial was not explicitly enshrined as a fundamental right in the Constitution. However, these rights have now been provided under Article 10-A, introduced by the Constitution (Eighteenth Amendment) Act, 2010. Even before the addition of this article to the Constitution, the right to a fair trial and due process was well-entrenched in our jurisprudence and considered as a part of the right of access to justice enshrined in the Constitution under Articles 4 and 9. Article 4 of the Constitution states that every individual has the right to be dealt with in accordance with the law, highlighting the necessity of legal processes that are fair and just. Article 9 further reinforces this by asserting that no person shall be deprived of life or liberty except in accordance with the law. These provisions collectively emphasized the importance of lawful procedures and the protection of individual rights, even before the explicit recognition of due process and fair trial in the Constitution. Thus, from the very beginning, this Court

has stressed the importance of fair criminal trials to protect the rights and interests of both the victim and the accused. A fair trial ensures that the accused has the opportunity to present a defence and challenge the evidence, while the victim's rights to be heard and to seek justice are upheld. By maintaining impartiality and balancing the interests of both parties, this Court strives to deliver justice and maintain public confidence in the judicial system. For instance, this Court, in the case of *Noor Ahmad versus the State* (**PLD 1964 SC 120**), while shedding light on the conduct of criminal trials, observed that it is a fundamental principle that the trial of an accused person should be conducted with the utmost fairness and that anything likely to cause serious embarrassment to the accused in the conduct of their defence should be avoided. The relevant paragraph is quoted below for ease of reference:"

> '*We are also of the same view. Even though sections 235 and 239 of the Criminal Procedure Code give a discretion to the Court to try certain persons and or offences jointly yet there are certain considerations which are more fundamental than merely the convenience of the proceeding or trial which must be kept in view when deciding as to whether the discretion should in given in case be exercised or not.* ***In a criminal trial, as we have already observed, it is a fundamental principle that the trial of an accused person should be conducted with the utmost fairness and anything which is likely to cause nay serous embarrassment to him in the conduct of his defence should be avoided.*** *Thus, in the present case, it seems to us that whether a collision in such circumstances constituted one transaction or not there should not have been a joint trail of the appellants before us for more than one reason Firstly because the accusations made against them did not allege any kind of joint or concerted action nor disclosed any causal connection between the respective acts of the appellants*....'

7. Later, in the case of *Ch. Manzoor Elahi versus Federation of Pakistan etc.* (**PLD 1975 SC 66**), this Court delved into the concept of 'due process' and on pages 109, 119, and 120 of the judgment provided a detailed explanation of what 'due process' entails. The Court emphasized the importance of legal procedures that ensure fairness, justice, and the protection of individual rights. The relevant paras of the judgment are reproduced hereunder for ease of reference:

*'Article 4 may be compared `**with the due process of law in the American Constitution**. The case of Government of West Pakistan v. Begum Agha Abdul Karim Shorish Kashmiri PLD 1969 S C 14, supports this view. In the case under report Article 2 of the 1962 Constitution which is corresponding to Article 4 of the Constitution was considered and the Court observed as follows:-*

> *"The words `in an unlawful manner' in sub-clause (b) of Article 98 (2) have been used deliberately to give meaning and content to the solemn declaration under Article 2 of the Constitution itself that it is inalienable right of every citizen to be treated in accordance with law and only in accordance with law. Therefore, in determining as to how and in what circumstances a detention would be in an unlawful manner one would inevitably have first to see whether the action is in accordance with law, if not, then it is action in an unlawful manner.* ***Law is here not confined to statute law alone but is used in its generic sense as connoting all that is treated as law in this country including even the judicial principles laid down from time to time by the superior Courts.*** *It means according to the accepted forms of legal process and postulates a strict performance of all the functions and duties laid down by law. It may well be as has been suggested in some quarters, that in this sense it is as comprehensive as the American 'due process' clause in a new garb.* ***It is in this sense that an action which is mala fide or colourable is not regarded as action in accordance with law. Similarly, action taken upon extraneous or irrelevant considerations is also not action in accordance with law. Action taken upon no ground at all or without proper application of the mind of the detaining authority would also not qualify as action in accordance with law and would, therefore, have to be struck down as being action taken in an unlawful manner***."

Frontier Crimes Regulation was an "existing law" under Article 225 of the 1962 Constitution and Article 280 of the Interim Constitution. It continues to be an "existing law" under Article 268 of the present Constitution. The regulation has, therefore, always been and still is an existing law operating subject to the Constitution of the day.

Since the continued operation of the Frontier Crimes Regulation is subject to the Constitution a question arises whether the Regulation is `law' within the meaning of Articles 4 and 9 of the Constitution. In the case reported

in P L D 1969 S C 14, this Court has had occasion to observe that "law" in Article 2 of the 1962 Constitution (corresponding to Article 4 of the Constitution) is as comprehensive as the American "due process of law" clause in a new garb. A reference, therefore, to the views of the American jurists as contained in 16 American Jurisprudence will, be helpful to the discovery of the true meaning of the word "law" as contained in the said two Articles of the Constitution. The following are the extracts from that book: -

- *Due process of law' must be understood* ***to mean law in the regular course of administration through Courts of justice*** *(Vide 16 American Jurisprudence 2d paragraph 546).*

- *It means law according to the settled course of judicial proceedings or in accordance with* ***natural, inherent, and fundamental principles of justice, enforceable in the usual modes established in the administration of government with respect to kindred matters****.*

- *A general law administered in its legal course according to the form of procedure suitable and proper to the nature of the case, conformable to,* ***the fundamental rules of right and affecting all persons alike, is `due process of law****'.*

- *Due process has* ***to do with the denial of fundamental fairness shocking to the universal sense of justice****; it deals neither with power nor with jurisdiction, but with their exercise.*

- ***`Law embraces all legal and equitable rules defining human rights and duties and providing for their enforcement, not only as between man and man, but also between the State and its citizens****. (Vide 16 American Jurisprudence 2d paragraph 546).*

- *It is a general public law of the land (paragraph 547).*

- *It is the law* ***that operates on all persons alike and do not subject the individual to the arbitrary exercise of the powers of Government****.*

- *Under the `due process of law'* ***no change in procedure can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action which relate to process of law, protect the citizen in his private right and guard him***

against the arbitrary action of Government *(paragraph 549).*

- *Substantive due process has been roughly defined as the constitutional guarantee that no person shall be deprived of his life, liberty, or property for arbitrary reasons, such deprivation being constitutionally supportable only if the conduct from which the deprivation follows is prescribed by reasonable Legislation (i.e. the Legislation the enactment of which is within the scope of legislative authority) reasonably applied (that is, for a purpose consonant with the purpose of the Legislation itself).* ***To the extent that arbitrary action involves procedural arbitrariness, such action is, of course, barred by the principles of due process.*** *In general terms it has been stated that the requirement of due process of law may be satisfied if there is no unauthorised and merely arbitrary exercise of the powers of Government to the detriment of the people or of some of them.*

- ***It has been authoritatively stated that the right of a citizen to due process of law must rest upon a basis more substantial than favour or discretion****, and in many instances statutes have been held unconstitutional on the ground that they operated to vest in the Courts or in other officials an arbitrary power over matters protected by the Constitution (paragraph 550).*"

Applying the concept of `law' as contained in the extracts just quoted, section 11 of the Frontier Crimes Regulation (hereinafter called the F. C. R. which empowers the Deputy Commissioner to refer the determination of the guilt or otherwise of a person to the "Council of Elders," does not seem to me to be "law" as contemplated in Articles 4 and 9 of the Constitution. The section gives unfettered powers to the Deputy Commissioner to refer the said question for decision to a Council of Elders, if he thinks it inexpedient that the matter should be determined by any Court of the classes prescribed in section 6 of the Code of Criminal Procedure. **No guidance, at all, has been laid down in what circumstances the reference to the Council of Elders should be made. No rule of procedure or evidence has been prescribed for a proceeding before such Council. The Council is not prevented from adopting methods which are arbitrary and inconsistent with reason and the civilised decencies. The section has nothing to do with the regular course of administration through Courts of justice, and does not exclude arbitrary action involving procedural arbitrariness. It constitutes a**

denial of fundamental fairness shocking to universal sense of justice.'

8. In "*Constitution of the Islamic Republic of Pakistan: A Commentary on the Constitution of Pakistan*, 1962," by Muhammad Munir, former Chief Justice of Pakistan, it is mentioned on page 197 that in a criminal trial, an accused person has the following important rights under the general law:

> '1. *The right to know before the trial the charge and the evidence against him;*
> *2. The right to cross-examine the prosecution witnesses;*
> *3. The right to produce evidence in defence;*
> *4. The right to appeal or to apply for revision;*
> *5. The right to be represented by counsel;*
> *6. The right to have the case decided by the Judge who heard the evidence;*
> *7. The right to trial by jury or with the aid of assessors;*
> *8. The right to certain presumptions and defences; and*
> *9. The right to apply for transfer of the case to another Court.'*

The above rights were approvingly referred to and endorsed by a five-member bench of this Court in the case of *Brig. (Retd.) F.B. Ali and Another vs. the State* (**PLD 1975 SC 506**). In this case, the Court, with respect to the above list of rights, observed that the rights (except the right mentioned at serial No.7 which is no longer available in Pakistan) enumerated by Mr. Munir are clearly available in a trial even by a Court Martial.

HIGH COURT AS A COURT OF ORIGINAL CRIMINAL JURISDICTION

9. In our country, the Code of Criminal Procedure, 1898 ('**Cr.P.C.**'), as the general law of the land, governs the procedure for conducting criminal trials in all criminal courts. Even where special criminal laws are silent on certain matters, the courts take guidance from and follow the principles laid down in the Cr.P.C. Undoubtedly, under the scheme of the Cr.P.C., the High Courts fall within the category of Criminal Courts and can try any offence under the P.P.C. A detailed procedure for trial before the High Court has been outlined in Chapter XXII-A of the Cr.P.C. For a better understanding of the above legal position, the relevant provisions of the Cr.P.C. (**as existed at the time of the trial of Mr. Bhutto**) are discussed below:

Section 6, Cr.P.C. provides the different classes of Criminal Court and Magistrates as follows:

> **"*6. Classes of Criminal Courts and Magistrates*:** *(1)* ***Besides the High Courts*** *and the Courts constituted under any law other than this Code for the time being in force, there shall be five classes of Criminal Courts in Pakistan, namely: -*
>
> *(I) Courts of Session;*
> *(II) ***[1]*
> *(III) Magistrate of the first class:*
> *(IV) Magistrate of the second class;*
> *(V) Magistrate of the third class*."
>
> **Emphasis supplied.**

Section 28, Cr.P.C. states about the courts, competent to try offences under the P.P.C in the following words:

> **"*28. Offences under Penal Code:*** *Subject to the other provisions of this Code any offence under the Pakistan Penal Code may be tried—*
> *(a)* ***by the High Court****, or*
> *(b) by the Court of Session, or*
> *(c) by any other Court by which such offence is shown in the eighth column of the Second Schedule to be triable.*"
>
> **Emphasis supplied.**

Section 190, Cr.P.C. prescribes a mode for taking cognizance of an offence under P.P.C. as follows:

> '***190. Cognizance of offences by Magistrates****. (1) Except as hereinafter provided, any District Magistrate or Sub-Divisional Magistrate, and any other Magistrate specially empowered in this behalf, may take cognizance of any offence—*
>
> *(a) upon receiving a complaint of facts which constitute such offence;*
> *(b) upon a report in writing of such facts made by any police officer;*
> *(c) upon information received from any person other than a police officer, or upon his own knowledge or suspicion, that such offence has been committed.*
>
> *(2) The Provincial Government, or the District Magistrate subject to the general or special orders of the Provincial Government, may empower any Magistrate to take cognizance under subsection (1), clause (a) or clause (b), of offences for which he may try or send to the Court of Sessions for trial.*

[1] Item "(II) Presidency Magistrate" omitted by Criminal Law Amending Ordinance, 1949, Sch.

> *(3)* ***A Magistrate taking cognizance of an offence under subsection (1) of an offence triable exclusively by a Court of Session shall, without recording any evidence, send the case to the Court of Session for trial***.'
>
> **Emphasis supplied.**

Section 193, Cr.P.C. mandates that the Court of Sessions is not authorized to take cognizance of any offence as a court of original jurisdiction unless the case has been sent to it under section 190(3) supra. This provision of law is also reproduced hereunder for ease of reference:

> '***193. Cognizance of offence by Courts of Sessions****. (1) Except as otherwise expressly provided by this Code or by any other law for the time being in force,* ***no Court of Sessions shall take cognizance of any offence as a Court of original jurisdiction*** *unless the case has been sent to it under section 190, subsection (3).*
> *(2) Additional Sessions Judges and Assistant Sessions Judges shall tray such cases only as the Provincial Government by general or special order may direct them to try, or as the Sessions Judge of the Division, by general or special order, may make over to them for trial*.'
>
> **Emphasis supplied.**

Section 194, Cr.P.C. provides for the taking of cognizance of offences by the High Court as follows—

> **'*194. Cognizance of offences by High Court:*** *(1) The High Court may take cognizance of any offence in manner hereinafter provided.*
>
> *Nothing herein contained shall be deemed to affect the provisions of any Letters Patent or Order by which a High Court is constituted or continued, or any other provision of this Code.*
>
> *(2) (a) Notwithstanding anything in this Code contained the Provincial Government, exhibit to the High Court, against persons subject to the jurisdiction of the High Court, information for all purposes for which Her Majesty's Attorney-General may exhibit informations on behalf of the Crown in the High Court of Justice in England.*
>
> *(b) Such proceedings may be taken upon every such information as may lawfully be taken in the case of similar informations filed by Her Majesty\s Attorney-General so far as the circumstances of the case and the practice and procedure of the said High Court will admit.*
>
> *(c) All fines, penalties, forfeitures, debts and sums of money recorded or levied under or by virtue of any such*

information shall form part of the revenues of the Province.'

Emphasis supplied.

10. As per the mandate of section 28, Cr.P.C., the High Court and the Court of Session have concurrent jurisdiction along with subordinate courts to try offences under the P.P.C. The Court of Session, unlike the High Court, is not a court of original criminal jurisdiction. As section 193 of the Cr.P.C. places a complete and clear bar on taking cognizance of any offence by the Court of Session in its original jurisdiction unless the case is sent to it by a Magistrate under section 190(3), Cr.P.C. Section 190(3), Cr.P.C., prescribes a mode of transmitting criminal cases (exclusively triable by the Court of Session) by a Magistrate after taking its cognizance under section 190(1) of the Cr.P.C. to the Court of Session, without recording evidence, for trial. It may be noted that the Magistrate taking cognizance of the offence will decide the forum competent to try the offence keeping in view the provision of section 30 as well as Schedule II to the Cr.P.C. No departure from this procedure ordinarily is possible. A perusal of Column 8 of Schedule II, Cr.P.C., indicates that the High Court is not mentioned as one of the courts competent to try offences under the P.P.C. Under this column, either the offences are triable by the Court of Session or by a Magistrate. However, Section 194 of the Cr.P.C. authorizes the High Court to directly take cognizance of any offence under the P.P.C., even though the High Court is not mentioned in Column 8 of Schedule II of the Cr.P.C. as a Court competent to try any offence. The above-stated position was quite different before the promulgation of the Law Reforms Ordinance, 1972 whereby the words appearing in section 194(1) "**upon a commitment made to it**" were omitted. Before the said Ordinance, the provision of section 194(1) was as under:

'194. Cognizance of offences by High Court: *(1) The High Court may take cognizance of any offence,* ***upon a commitment made to it****, in manner hereinafter provided.'*

11. Thus, prior to the amendment of subsection (1) of section 194, Cr.P.C. as it has been indicated hereinabove the High Court had no jurisdiction to directly take cognizance of the offence except upon a commitment made to it in the manner provided

thereafter but after the amendment of subsection (1) of section 194, Cr.P.C. jurisdiction has been conferred upon the High Court to take cognizance of any offence directly. So far as the term '*in manner hereinafter provided'* is concerned it has been noticed that the said term has already been explained by a two-member bench of this court in the case of *Dr. Muhammad Afzal and others versus the State* (**2001 SCMR 1615**). The Hon'ble bench, after a thorough examination of the legal provisions on the subject, concluded that, '...*High Court can take cognizance of offence of Pakistan Penal Code under section 194, Cr.P.C. in the same manner as cognizance is taken under section 190(1)(c), Cr.P.C. by a Magistrate namely upon an information received from any person other than a police officer or upon his own knowledge or suspicion that such offence has been committed*.' In addition, the High Court may withdraw for trial any case pending before any subordinate court while exercising its powers under Section 526, Cr.P.C. However, whether the High Court takes direct cognizance of a case or withdraws it from a subordinate court, it must follow the procedure for trial as provided under Chapter XXII-A of the Cr.P.C.

MAJOR CONSTITUTIONAL AND LEGAL LAPSES IN THE CASE OF MR. BHUTTO

12. Keeping in mind the above-settled principles and procedures to be adhered to while conducting a criminal trial, and after a thorough scrutiny of the entire record of Mr. Bhutto's case from the trial court/High Court up to this Court, I have found the following major constitutional and legal lapses that caused the proceedings of the trial of Mr. Bhutto to fail to meet the requirements of a fair trial and due process:

I) Biased Conduct of the Acting Chief Justice

In this case, the incomplete report/Challan under section 173, Cr.P.C. ('**Challan'**) was submitted before the concerned area Magistrate on 11.09.1977. As the said Magistrate was not competent to try an offence punishable under section 302 P.P.C. (the main offence in the case), he, therefore, forwarded the same under section 190(3), Cr.P.C. to the Court of Session for trial. The record shows that on 13.11.1977, the State, through the Special

Prosecutor, filed a petition, i.e., Criminal Misc. Application No.127-T of 1977, for transfer of the criminal cases pending before a Court of Session at Lahore. The petition was fixed before the Acting Chief Justice, Mushtaq Hussain, who, on the same day, withdrew the case from the Court of Session and transferred it to the High Court and constituted a Full Court comprising five judges of the High Court for the trial of the case, and also adjourned the case to 24.09.1977 for hearing, vide the same judicial order dated 13.09.1977 (as reproduced in para 15 of the detailed opinion).

It would not be out of place to mention here that Chapter 1 of Volume–V of the High Court Rules & Orders deals with the Judicial Business of the High Court. Its Part A(b) prescribes a procedure for the disposal of petitions for the transfer of criminal cases. Rule 5 provides, '*the petitions for transfer of cases shall ipso facto be treated and dealt with as urgent petitions*'. Rule 6 provides, '*Notice of the hearing of urgent petitions shall not be given individually to the petitioner or his counsel but a list of such petitions shall be hung up for the purpose on the notice board outside the Deputy Registrar's room and/or displayed in electronic media on the day* ***proceeding the date fixed for the hearing*** *of these petitions giving the name of the Judge by whom the petition will be heard*.' Rule 7 provides, '*In petitions for transfer of cases under section 526, Criminal Procedure Code, filed in the High Court, the Sessions Judge shall, without fail, return all notices received by him from the High Court, whether for himself or for parties, after service, within one week from the date of their receipt*.' Rule 8, Part A(b) further provides that '*The Sessions Judge shall, without fail, also submit, within one week from the date of receipt of the High Court letter, all reports or explanations called for by the High Court from himself or the Magistrate concerned with regard to allegations contained in the petitions for transfer or affidavit, copy whereof will accompany the said letter*.' However, the then Acting Chief Justice sidestepped the above-noted prescribed procedure and, without giving/issuing any notice to the Court of Session/trial court for service to the parties, displaying the same in electronic media, or seeking any report or explanation from the Court of Secession/trial court with regard to allegation contained in the petition, passed the order dated 13.09.199 in a hasty manner.

Furthermore, he (the Acting Chief Justice) did not satisfy any of the conditions/grounds mentioned in section 526(1)(a-e) for exercising his jurisdiction under the said provision of law. The said order is also silent on the fact of what urgency or exigency necessitated the Acting Chief Justice to constitute a Full Bench for trial through a judicial order instead of a special order as required under Part-B of Chapter 3 of the High Court Rules & Orders. Without having any lawful authority, he, vide the said order, fixed the next date of hearing in the main case, even though the case file was not before him. Under the law, after the constitution of the Full Court/trial court, it is the exclusive power of the Full Court/trial court to fix the next hearing date at its convenience. All the aforementioned facts indicate his undue favor to someone against Mr. Bhutto. Even otherwise, the language of the order dated 13.09.1977 '*In view of the submissions made in the petition the case is transferred to this Court for trial*' *ex-facie* speaks volumes about his apparent bias or impartiality against Mr. Bhutto.

II) Non-observance of Prescribed Procedure by the Full Court

On September 24, 1977, the Full Court took up Mr. Bhutto's case for the first time and delivered the requisite copies to the accused persons (Mr. Bhutto, Mian Muhammad Abbas, Arshad Iqbal, Rana Iftikhar, and Ghulam Mustafa) under section 265-C, Cr.P.C. The Court also summoned the evidence for October 2, 1977. As previously mentioned, the Full Court was bound to follow the procedure for trial as provided under Chapter XXII-A of the Cr.P.C. Under this chapter, section 265-D stipulates that if, after perusing the police report or the complaint and all other documents and statements filed by the prosecution, the Court is of the opinion that there is ground for proceeding with the trial of the accused, it shall frame in writing a charge against the accused. However, the Full Court did not frame any charges against the accused persons, thereby ignoring the above mandatory provision of law and directly summoned the evidence. This implies that the Full Court had already formed its opinion to proceed with the trial even without perusing the record. However, the charges were formally framed against the accused person on October 11, 1977.

On November 5, 1977, Mr. Bhutto filed an application before the Full Bench, expressing his apprehension that a fair and impartial trial would not be conducted in his case. The Full Court, instead of disposing of the application, observed, '*This application be placed on record, which shall be disposed of in accordance with law, after the trial.*' I find this course of action adopted by the Full Court difficult to understand. The application should have been disposed of promptly, considering that the accused was expressing distrust in the Court. However, the Court seemed adamant about concluding the trial without addressing the concerns raised by Mr. Bhutto.

III) In-Camera Trial Without Any Justification

On January 24, 1978, Mr. Bhutto informed the Full Bench that he had boycotted the trial after the cross-examination of Ghulam Hussain (PW.34) and, therefore, he was not prepared to answer any questions under section 342 of the Cr.P.C., which were directly related to his defence. Upon this, the Full Court made a general observation that the accused (Mr. Bhutto) had made several scurrilous, scandalous, and baseless attacks on the impartiality of the Bench. Consequently, the Court, solely based on the above reason, directed that the proceedings of the case be held in camera. It further ordered that no part of the in-camera proceedings would be published in any form whatsoever. Section 352, Cr.P.C. provides that the place in which any Criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed an open Court, to which the public generally may have access, so far as the same can conveniently contain them. This provision of law, however, provides an exception to the above general rule that the Presiding Judge may, if he thinks fit, order at any stage of any inquiry into or trial of, any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the Court.

I would feel no hesitation to observe here that this was a trial of a prominent politician who was also the head of a major political party and had served as the Prime Minister of the country. Against whom allegations of criminal conspiracy leveled by another politician in connection with the murder of his father. This situation

created a compelling need for an open trial to ensure that justice was not only done but also perceived to be done transparently. An almost similar observation has been made by a five-member bench of this Court in *Syed Ali Nawaz Gardezi versus Lt.-Col. Muhammad Yusuf* (**PLD 1963 SC 51**) wherein the said Hon'ble Bench upheld the findings of the trial court, which ordered an open trial for the accused because the accused was a high-ranking government official. This decision highlights the importance of transparency and public scrutiny in cases involving individuals in significant positions of authority. In light of these considerations, it appears that the Full Bench did not exercise its discretion appropriately by ordering an in-camera trial and caused serious prejudice to the accused, Mr. Bhutto in contumacious disregard of the law previously declared by this Court in the *Nawaz Gardezi* case *supra*.

IV) Denial of the Right to Defend

Similarly, On January 28, 1978, the request of Mr. Bhutto for the supply of a copy of his statement recorded under section 342, Cr.P.C. on January 25, 1978, was declined (with the permission only to see that statement) for the reason that the proceedings were held in camera. In the case of Mr. Bhutto, the legal requirements for a fair trial, such as due notice and the opportunity to defend oneself, appear to have been compromised, as he was not provided with the materials necessary to prepare his defence effectively. This could possibly undermine the fairness and integrity of the trial proceedings. A fair trial for a criminal offence involves not only the technical observance of the framework and formalities of the law but also the recognition and just application of its substantive principles to ascertain the truth and prevent miscarriage of justice.

V) Erroneous Appreciation of Evidence of Approver

There is no denying the fact that there was no direct evidence in this case, which was solely based on the evidence of the approvers Masood Mahmood and Mian Muhammad Abbas. Under section 133 of the Evidence Act, 1872 (now Article 16 of the Qanoon-e-Shahadat Ordre, 1984), an accomplice is a competent witness against an accused person. Thus, the evidence of an accomplice

holds significant importance in the criminal justice system, particularly in cases where direct evidence is scarce. An approver is a participant or accomplice in a crime who agrees to testify against their fellow accused in exchange for leniency or a pardon. However, the evidence of an approver is treated with caution due to the inherent risk of unreliability and the possibility of ulterior motives. Section 114, illustration (b) of the Evidence Act, 1872 (now Article 129, illustration (b) of the Qanoon-e-Shahadat Ordre, 1984), reinforces this caution by requiring that the testimony of an approver be corroborated in material particulars by independent and reliable evidence. This corroboration is necessary to ensure that the testimony of the approver is truthful and not fabricated to secure their own benefit. This Court in the case of *Ghulam Qadir and another versus the State* (**PLD 1959 SC (Pak.) 377**) had a chance to examine the evidentiary value of an approver. After a thorough analysis of the material available on record and the law on the subject, a 3-member bench of this Court laid a **normal standard of corroboration** for the acceptance of the evidence of an approver in a criminal case. S*. A. Rahman, J.-* (as he then was) speaking for the bench observed as under:

> 'As a matter of strict law, the uncorroborated testimony of an accomplice could, if accepted, form the basis of a conviction in a criminal case. However in the course of judicial precedents, **a rule of prudence has been evolved under which it is always insisted that there ought to be independent corroboration of an approver's statement on material points suggesting a link between accused persons and the crime before such a statement could be accepted as a safe foundation for their conviction.** The reason for the rule is obvious. There is always danger of substitution of the guilty by the innocent in such cases and it is realised that it would be extremely risky to act upon the statement of a self-confessed criminal who while trying to save hip own skin, might be unscrupulous enough to accept suggestions of others to inculpate a person unconnected with the crime in place of his real accomplice for whom he may have a soft corner. **But the corroboration required would depend on the facts and circumstances of each particular case and no hard and fast rule can be laid down in this behalf.** Surely, one of the factors calling for consideration may be the circumstance that the approver had no ostensible motive to involve any of the accused persons falsely in the case. That does not imply any relaxation of normal standards of corroboration in such cases and

indeed, in my humble judgment, the High Court, in the present case, does nor appear to have been guilty of any such lapse.'

The above normal standard of corroboration was followed by a subsequent equal bench of this Court in the case of *Abdul Khaliq versus the State* (**1970 SCMR 307**). The bench observed, "*The extent and nature of corroboration of the testimony of an accomplice may vary from case to case. The rule of practice requiring corroboration of the evidence of the accomplice is that the corroboration must be in respect of some material particulars implicating the accused, and it is not necessary that evidence of the accomplice should be corroborated in every detail of the crime*.' Later, a 5-member bench of this Court in the case of *Abdul Majid and another versus the State* (**PLD 1973 SC 595**) approvingly referred to the above observations of the earlier 3-member bench regarding the requirement of the normal standard of corroboration of the statement of an approver and decided the case accordingly.

Later a matter involving the encounter/murder of six persons by the police came for consideration before this Court in the case of *Ch. Muhammad Yaqoob and others versus the State* (**1992 SCMR 1983**). This Court after analyzing the case law from 1949 to 1991 observed that the testimony of an approver is to be scrutinized with care and caution and the Court should be doubly sure that his (approver's) evidence is corroborated in material particulars by reliable evidence. Further, this Court laid down the following principles for appreciating the evidence of an approver:

(i) That if a statement of fact made by an accused in a confession is of the nature **that if it is assumed to be true, it would negate the offence alleged to be confessed**, it is called an exculpatory confession.

(ii) That a statement of an accused that **contains self-exculpatory matter cannot amount to confession**.

(iii) That a **retracted confession is sufficient to sustain a conviction for a capital offence, if the Court is of the view that the same is voluntary and is true**, but as a rule of prudence, it has been consistently held by the superior Courts that the same should not be acted upon unless corroborated by some other reliable evidence in material particulars.

(iv) That though **the confession of a co-accused cannot be made the foundation of conviction** but it may be used in support of other evidence.

(v) That **the confession of a co-accused is an evidence of a weak character**.

(vi) That under Islamic Jurisprudence, in order to make a confession reliable, **it should be voluntarily made and not on account of any coercion, duress or violence**.

(vii) That any delay in recording of a confession may, or may not, be fatal as to the evidentiary value of a retracted confession as in the case of Sved Sharifuddin Pirzada v. Sohbat Khan and 3 others (supra), this Court has held **that the factum that the accused were in the police custody for 11 to 15 days, was not fatal as to the credibility of the retracted confessions for the reason that the Court was satisfied that the retracted confessions were not tutored and were, in fact, made voluntarily**.

(viii) That any lapse on the administrative side on the part of a Magistrate recording a confession, may not be fatal as to the evidentiary value of such confession **provided the Court is satisfied that the lapses on his part have not, in any way, adversely affected the voluntariness or truthfulness of the confession**.

(ix) That **if an accomplice's evidence is not corroborated in material respects, it cannot be acted upon and that the evidence of an accomplice cannot be used to corroborate evidence of another accomplice**.

It is relevant to mention here that the provisions of sections 337 to 339, Cr.P.C., lay down the procedure for tendering a pardon to an accomplice. The combined effect of these provisions is that a pardon may be tendered with the objective of '*obtaining the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, the offence.*' A pardon can be offered to such a person on the condition that he makes a full and true disclosure of all circumstances within his knowledge related to the offence and to every other person involved, whether as a principal or abettor, in its commission. It is evident that, without attempting to provide a formal definition of the term '*accomplice'*, the above provisions outline the criteria necessary for treating a person as an accomplice to tender a pardon. An accomplice, therefore, means a guilty associate or partner in crime, someone who is consciously connected with the offence in some way, whether before, during, or

after its commission, or who makes admissions of facts showing that he had a conscious hand in the offence. If a witness is not concerned with the commission of the crime for which the accused is charged, he cannot be said to be an accomplice in the crime. In other words, an accomplice is a *particeps criminis*, who is consciously so connected with the criminal act done by his confederate that he, due to the presence of the necessary *mens rea* and his participation in the crime in some way, can be tried alongside that confederate who actually perpetrated the crime. A witness who could not be so indicted due to the absence of *mens rea* cannot be considered an accomplice.

VI) Masood Mahmood does not qualify to be an Approver

As the case rests mainly on the evidence of the approver his evidence requires a careful scrutiny, and can only be accepted if it is supported in material particulars by other reliable evidence. Upon examining the testimony of the approver (PW-2), numerous discrepancies and irregularities have been observed. Nonetheless, the following significant excerpts from his evidence are reproduced below for a thorough understanding and proper appreciation of his evidence:

> '*In June 1974 when Mr. Ahmad Raza Kasuri was speaking in the National Assembly, Mr. Zulfiaqat Ali Bhutto addressed him directly and not through the Speaker as follows: He asked him to keep quiet, that he had enough of him and that he would not tolerate his nuisance anymore. This is more or less, what the Prime Minister said. A day or two later I was sent for by the prime Minister.* ***He, inter alia, said to me that he was fed up with the obnoxious behavior of Mr. Ahmad Raza Kasuri and that Mian Muhammad Abbas, an Officer of the FSF, knew all about his activities.*** *This officer is an accused in this Case. The then Prime Minister further told me that this officer had already been given directions through my predecessor to get rid of Mr. Ahmad Raza Kasuri.* ***The Prime Minister went on to instruct me that I should ask Mian Muhammad Abbas to get on with the job and produce the dead body or Mr. Ahmad Raza Kasuri or his body bandaged all over.***'
>
> '*On the 11th of November, 1974, I was at Multan so was Mr. Zulfiqar Ali Bhutto. Very early in the morning he rang me up.* ***He said to me, "Your Mian Abbas has made complete balls of the situation. Instead of Mr. Ahmad Raza kasuri, he has got his father killed****". I*

> *was taken by surprise. The Prime Minister hung up after telling me that he would summon me later…… Soon after that, when I returned to the Headquarters,* ***Mian Abbas informed me and reported to me that his operation had been successful, but instead of the intended victim his father Nawab Muhammad Ahmad Khan had been murdered at Lahore***'.
>
> '*As far as I remember, I left Multan in the same after-noon. I was summoned by Mr. Bhutto on our return to Rawalpindi. He was peeved and agitated. He said that the actual task had yet to be accomplished. I said to him, "****at your behest, an idea conceived by you was carried out and communicated by me to Mian Abbas who already your directions through my predecessor and the fact remains that both you and I and my subordinates will be taken to task by God Almighty, but I will not carry out any such orders any more***'.

In answer to a question during cross-examination, the approver (PW-2) stated that:

> '***I did not give any plan of mine to Mian Muhammad Abbas for committing the murder of Mr. Ahmad Raza Kasuri.*** *Since Mr. Abbas had assured me about the execution of the orders ive to him by the then Prime Minister, therefore, I did not give any person to him for the execution of those orders'*.

A careful examination of the above-quoted excerpts from the evidence of Masood Mahmood, the approver (PW-2), reveals that he implicitly distanced himself from the alleged conspiracy involving Mr. Bhutto. He portrayed himself as an innocent and God-fearing man who merely conveyed a message from the then Prime Minister to another officer, treating it as part of his official duties. Moreover, the alleged incident took place on November 11, 1974, and he was taken into custody on July 5, 1977, with his confessional statement recorded on August 24, 1977. To substantiate his *bona fides* and the voluntariness of his actions, he claimed that on August 14, 1977, he wrote a letter to the Chief Martial Law Administrator, explicitly disclosing the misdeeds of the Federal Security Force, as well as his own actions wrongly carried out under the orders of Mr. Bhutto. Surprisingly, the letter was written after more than two and half years of the occurrence while he was in custody. If he had truly repented for his previous actions, he should have written that letter before his arrest. However, this stance has no value, as the letter or

a copy thereof was not produced by him as evidence. He also failed to explain why he remained silent for approximately two and half years after the alleged incident and why he did not report it to the concerned authorities. Even otherwise, if his entire statement is considered in its totality, it does not constitute any offence. His statement is free from any *mens rea* and is therefore exculpatory; thus, he does not fall within the category of an accomplice. However, the High Court/Trial Court did not take note of this important aspect of the matter and, relying upon the evidence of the approver, erroneously convicted Mr. Bhutto. Although, this Court, in paragraph 413 of the majority judgment, made an important observation to the effect, '...*If a witness is not an accomplice in the sense indicated above, namely, on account of the absence of mens rea then the real question is not of requiring corroboration of his evidence, but of the degree of credit to be attached to his testimony, depending on all the facts and circumstances of the particular case. In other words, he has then to be judged as any other witness, without introducing an artificial' requirement of corroboration of his evidence by applying the rule contained in illustration (b) to section 114 of the Evidence Act*.'

Later, the majority judgment (para 456) concluded that Masood Mahmood, the approver was a truthful and reliable witness and dismissed the appeal of Mr. Bhutto while hypothetically observing, *'that Masood Mahmood enjoyed a special position under Zulfiqar Ali Bhutto, that he was in close and constant touch with him throughout his tenure as Director-General of the Federal Security Force from 1974 to 1977, that he was shown all kinds of favours and considerations by being sent abroad for official visits and medical treatment, that he was not the only civilian official taken into custody on the proclamation of Martial Law, and that during his long career in the Police service of Pakistan, he had held important positions involving the assumption of responsibility and exercise of authority, and it was, therefore difficult to hold that Masood Mahmood had become an instrument in the hands of the Martial Law authorities to deliberately and falsely concoct the story he had narrated at such length at the trial. A further significant fact strengthening this conclusion was that even if he was pressurised to falsely implicate the former Prime Minister, there was no reason for the Martial Law*

authorities, or for Masood Mahmood himself to falsely assign an important operational role in the conspiracy to the appellant Mian Muhammad Abbas, who was then functioning as one of the Directors of the Federal Security Force, incharge of Operations and Intelligence...'.

VII) Lack of Corroboration of Evidence of the Approver

If, for the sake of argument, it is accepted that Masood Mahmood fulfills all the requirements of being an approver, the next important legal question is whether the prosecution has succeeded in providing the necessary corroboration to support his testimony. To find the answer, I thoroughly examined the available records and was highly disappointed to find any convincing evidence to corroborate the sequence of events as alleged by Masood Mahmood, the approver. As far as the motive is concerned, it has been found from the excerpt of evidence of Masood Mahmood, as quoted above, that the motive mainly set out by the prosecution was Mr. Bhutto's speech in June 1974 in the National Assembly, where he directly addressed Mr. Ahmad Raza Kasuri and said he had enough of him and would not tolerate his nuisance anymore. In addition to this, Mr. Ahmad Raza Kasuri, while appearing as PW-1 before the High Court/Trial Court, gave a detailed account of his differences with Mr. Bhutto. Notably, he stated that he was a founding member of the Pakistan People's Party ('**PPP'**), formed on December 1, 1967, and was elected to the National Assembly in 1971 on that party's ticket. As he considered Mr. Bhutto a power-hungry, their relations cooled and eventually became strained. The above are the two main reasons for the involvement of Mr. Bhutto in this case, as per the prosecution evidence available on record. It is worth discussing a shocking fact: Mr. Ahmad Raza Kasuri, while appearing as PW-1, disclosed that Mr. Bhutto formally expelled him from the PPP in October 1972. In June 1973, he joined *Tehrik-I-Istiqlal* and then rejoined the PPP on April 6, 1976, due to an instinct for self-preservation. I am unable to understand, and even a person of ordinary prudence could not fathom, why he would rejoin a party led by someone accused of conspiring in his father's death. His rejoining is not justified in any manner, regardless of his reasoning. Based on these facts, it could be surmised that Mr. Ahmad Raza

Kasuri might have been subjected to some external pressure possibly motivated by the then Martial law regime to implicate Mr. Bhutto in the murder of his father, even though he might not have personally wished to do so or might have been convinced of Mr. Bhutto's innocence subsequently.

VIII) Motive Remained Unproved

Even otherwise, when there are open hostilities between two groups, the motive factor may propel one side to commit a crime, and the same factor may possibly induce the other group to implicate their rivals. Further, the motive is a double-edged weapon, which can be used either way and by either side i.e. for real or false involvement. Reference in this regard may be made to the cases of *Noor Elah v. Zafarul Haque* (**PLD 1976 SC 557**); and *Allah Bakhsh Vs. The state* (**PLD 1978 SC 171**). Therefore, to my understanding the prosecution failed to establish the motive part of the case; but the High Court/Trial Court (in para 464 of the judgment) had erroneously held, '*the motive to kill Ahmad Raza Kasuri is proved to be on the part of the principal accused [Mr. Bhutto*]'. Similarly, this Court in para 497 of the majority judgment subscribed to the finding of the High Court/Trial Court while ignoring the above apparent fundamental inconsistencies in the case of the prosecution and held that Mr. Bhutto had a strong motive to do away with Ahmad Raza Kasuri owing to their violent political differences, and the manner and the language in which Ahmad Raza Kasuri gave vent to his views against the former Prime Minister and his polices.

IX) The Retracted Confession of Mian Abbas carries no Evidentiary Value

A careful examination of the confessional statement made by Mian Abbas under section 164, Cr.P.C. shows that he also attempted to exculpate himself by laying the blame on approvers Masood Mahmood and Ghulam Hussain and incidentally implicating Mr. Bhutto in this crime. Under these circumstances, his statement cannot be treated as a confession for the purposes of section 30 of the Evidence Act, 1872 (now Article 43 of the Qanoon-e-Shahadat Order, 1984). Moreover, he had initially admitted his guilt and recorded his judicial confession. However, he later retracted that confession, yet the High Court/Trial Court convicted

him and sentenced him to death. During the appeal proceedings before this Court, he again changed his mind, retracted the retraction of his judicial confession, and pleaded guilty. Although a conviction can be based on a retracted judicial confession provided it is corroborated, the conduct of Mian Abbas as described above makes him a highly unreliable witness in case involving a capital sentence.

X) Impact of Negative Report of Ballistics Experts

Additionally, the negative report of the Ballistics Expert dated September 8, 1977, regarding the use of any of the 25 guns of the third Battalion of the FSF, then stationed in Walton Lahore, in the present crime undermines the entire prosecution case, not only in regard to the use of weapons belonging to this Battalion but also regarding the use of FSF ammunition. Particularly, this report is fatal to the evidence of the approver Ghulam Hussain and of the other witnesses who claimed to have supplied Short Machine Guns (SMGs) and ammunition to Ghulam Hussain for the purpose of carrying out an attack on Mr. Ahmad Raza Kasuir.

DISAGREEMENT WITH CERTAIN REASONS IN THE DETAILED OPINION

13. No doubt, the High Court, as earlier discussed, is fully competent to take direct cognizance under section 194, Cr.P.C. of a criminal case for the commission of any offence under the P.P.C. or transfer the same to itself for trial under section 526, Cr.P.C., as both provisions have existed in the Cr.P.C. since its inception in 1898. If these provisions were found to be inappropriate, the Parliament could amend or delete them in any of the subsequent amendments made after its adoption. Given the above legal position, I do not agree with the observation made in para 26 of the detailed opinion authored by the Chief Justice whereby it has been observed, '*Article 185(2)(b) of the Constitution and sections 411-A and 526, of the Code permit trial to be conducted by the High Court, but these provisions* ***do not provide for a High Court to conduct a murder trial***.' I would feel no hesitation to state here that Section 411-A, Cr.P.C. only provides a remedy of appeal to an accused who has been convicted in a trial held by the High Court in the exercise of its

original criminal jurisdiction. An exception is attached to this provision, under which no appeal lies in cases where an appeal lies to the Supreme Court under Article 185 of the Constitution. Article 185(2)(b) of the Constitution stipulates that an appeal shall lie to the Supreme Court from any judgment, decree, final order, or sentence of a High Court if the High Court has withdrawn any case for trial before itself from any court subordinate to it and has in such trial convicted the accused person and sentenced him. As the High Court withdrew the case of Mr. Bhutto from the Court of Session/Trial Court and convicted him, his case was not covered under section 411-A, Cr.P.C. being subject to its exception clause. Therefore, Mr. Bhutto filed a direct criminal appeal before this Court under Article 185(2)(b).

14. The Chief Justice, with due respect, erred in understanding the true meaning and purpose of Article 185(2)(b) of the Constitution and sections 411-A and 526 of the Cr.P.C. Consequently, his observation that the aforementioned provisions of law permit the trial to be conducted by the High Court, but do not allow the High Court to conduct a murder trial, is untenable under the law being based on a misconception of these provisions. It is, however, true that the trial of Mr. Bhutto, for the first time, was conducted by the High Court in its original criminal jurisdiction; but now one more example can also be quoted from the recent past. Where a single bench of the Islamabad High Court tried the case of an on-duty Additional Sessions Judge, Raja Khurram Ali Khan, and his wife, Maheen Zafar, for torturing their domestic worker, Tayyaba Bibi. They were both convicted and sentenced and their criminal appeal under section 411-A, Cr.P.C., was dismissed by the Division Bench of the same High Court. See *Raja Khurram Ali Khan and another versus Tayyaba Bibi and another* (**2019 YLR 98**). A Criminal Appeal filed against the judgment of the Division Bench was also dismissed by this Court. See *Raja Khurram Ali Khan and 2 others v. Tayyaba Bibi and another* (**PLD 2020 SC 146).**

15. As far as the observation of the Chief Justice in para 27-28 of the detailed opinion regarding confirmation of the death sentence by the High Court is concerned, my understanding of the legal framework as provided under Chapter XXVII titled 'OF THE

SUBMISSION OF SENTENCES FOR CONFIRMATION' is quite different. Under this chapter, the Legislature has provided valuable safeguards for the life and liberty of convicts in cases involving capital sentences. The provisions contained therein seek to ensure that in capital sentence cases, where the life of the convicted person is at stake, the entire evidentiary material bearing on the innocence or guilt of the accused and the question of the sentence must be scrutinised with utmost caution and care by a superior Court. This Chapter only deals with the sentence of death passed by a Court of Session and it has nothing to do with the sentence of death passed by a High Court while trying a case in its original criminal jurisdiction. The provision of section 374 is more than clear in this regard which states as under:

> '***374. Sentence of death to be submitted by Court of Session****: When* ***the Court of Session*** *passes sentence of death, the proceedings* ***shall be submitted to the High Court*** *and the sentence shall not be executed unless it is confirmed by the High Court'*.
>
> **Emphasis Supplied**.

Further, section 377 states as under:

> *'****377. Confirmation of new sentence to be signed by two Judges****: In every case so submitted, the confirmation of the sentences, or any new sentence or order passed by the High Court, shall, when such Court consists of two or more Judges, be made. passed and* ***signed by at least two of them****.'*
>
> **Emphasis Supplied**.

16. The above provisions are clear and require no further interpretation regarding whether a death sentence passed by a Full Bench comprising five judges of the High Court still requires confirmation by another two judges of the same Court. On a reference for the confirmation of the sentence of death, the High Court is required to proceed in accordance with sections 375 and 376, Cr.P.C. and the provisions of these sections make it clear that the duty of the High Court, in dealing with the reference, is not only to see whether the order passed by the trial court is correct, but to examine the case for itself and even direct a further enquiry or the taking of additional evidence if the Court considers it desirable in order to ascertain the guilt or the innocence of the convicted person. If, for the sake of argument, it is accepted that the said death

sentence passed by a Full Bench still requires confirmation by another two judges of the same High Court, it would be against the spirit of the above Chapter as well as the settled law whereby a smaller bench cannot sit as an appellate authority against the decision of a larger bench even it would disturb the internal hierarchy of the High Court. For instance, Section 3(1) of the Law Reforms Ordinance, 1972, provides for an appeal to a bench of two or more judges of a High Court from a decree passed or final order made by a single judge of that Court in the exercise of its original civil jurisdiction. But no such appeal would lie if the decree or final order is made by a bench comprising more than one judge, thus rendering the said provision of law redundant. Similarly, we, for the purposes of Section 374, Cr.P.C., cannot use the terms 'Court of Session' and 'High Court' interchangeably, as both are distinct and separate judicial forums. Consequently, when the High Court passes a sentence of death in its original criminal jurisdiction, the above Chapter XXVII of Cr.P.C. becomes redundant an inoperative. However, the convict may seek the remedy of appeal under Article 185(2)(b) of the Constitution or Section 411-A, Cr.P.C., as the case may be, as discussed in the preceding paragraphs. Therefore, with such an interpretation and understanding of Chapter XXVII of Cr.P.C., I am unable to agree with the view expressed by the Chief Justice in paragraphs 27 to 30 of the detailed opinion regarding the application of Chapter XXVII, as well as the loss of the right of appeal in the case of a criminal trial conducted by the High Court in its original criminal jurisdiction, as being misconceived.

17. In conclusion, while exercising the restraint expected of me in an advisory jurisdiction, I have no hesitation in stating that no evidence whatsoever was available on record to sustain the conviction of Mr. Bhutto as recorded by the High Court/Trial Court and upheld by this Court. The evidence of the material witnesses, namely Ahmad Raza Kasuri (PW-1), Masood Mahmood (PW-2), Saeed Ahmad (PW-3), Mr. Welch (PW-4), and Ghulam Hussain (PW-31) is full of contradictions, improvements, and improbabilities and was not sufficient for awarding the capital punishment to Mr. Bhutto. Even the majority of this Court erroneously subscribed to the findings of the High Court/Trial Court without carrying out any

independent analysis or review of the material available on record. In short, the case of Mr. Bhutto is a bitter example of unfairness, wherein both substantive and procedural laws were misapplied to please the then-Martial Law authorities. As a result, we lost a great political leader. This case stands as a stark reminder of how legal systems can be manipulated for political gain, leading to grave injustices. The misapplication of laws in this case not only undermined the integrity of the judicial process but also eroded public trust in the legal system. It highlights the importance of judicial independence and the need for courts to be free from political influence. The loss of Mr. Bhutto, a visionary leader, was not just a blow to his supporters but to the nation as a whole, depriving it of his leadership and contributions.

18. The above are the reasons in support of the unanimous short opinion rendered by this Court on 06.03.2024.

(SYED HASAN AZHAR RIZVI)
Judge

Approved for reporting.
Islamabad,
*Ghulam Raza/****