IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:
Mr. Justice Mushir Alam
Mr. Justice Sardar Tariq Masood
Mr. Justice Yahya Afridi

CRIMINAL APPEALS NO. 599 TO 602 OF 2020 AND CRIMINAL PETITIONS NO. 1085 AND 1086 OF 2020

(On appeal against the judgments judgment dated 2.4.2020 passed by the High Court of Sindh, Karachi, passed in Sp. Crl. Anti-Terrorism Appeals No.66 & 67, 68/2002 and confirmation case No.12/2002)

The State thr. P.G. Sindh *(Crl. As. No. 599 to 601/2020)*
Ahmed Omar Sheikh *(Crl. A. No. 602/2020)*
Ruth Pearly wife of Judea Pearl & another *(Crl. Ps. No. 1085 & 1086/2020)*
Appellants/Petitioners

Versus

Ahmed Omar Sheikh *(Crl. A. No. 599/2020)*
Fahad Nasim Ahmed and others *(Crl. A. No. 600 to 601/2020)*
The State thr. Prosecutor General Sindh etc. *(Crl. A. No. 602/2020 and Crl. Ps. No. 1085 & 1086/2020)*
Respondents

For the appellant/State: *(Crl. As. No. 599 to 601/2020)* and Crl. Ps.No. 1085 & 1086/20, *Resptd in Crl.A.602/20 and for* R. No.1 in Crls.1085-1086/20)	Mr. Farooq H. Naek, Sr. ASC Dr. Faiz Shah, P.G. Sindh Assisted by Ms. Rahat Ahsan, Addl. PG Sindh Mr. Hussain Bux Baloch, Addl. PG Sindh. Mr. Adnan Shuja Butt, ASC Mr. Feroze Jamal Shah, ASC Mr. Usman Waleed Sh, Advocate Mr. Muhammad Kassim Mirjat, AOR
(Crl.As.602/20 also for Respdt in Crl.A.599/20 and Respdt. R.No.1&3 in Crl.A.600 & 601/20 Respdt in Crl.P.1085/20 and R.No.2 2&3 in Crl.P.1086/20)	Barrister Mehmood A. Sh, Sr. ASC Mr. Mahmood A. Sheikh, AOR
For the petitioner: (in Cr.P.1085 & 1086/20)	Mr. Faisal Siddiqui, ASC Assisted by Ms. Sheza Ahmed, Advocate Ms. Amna Anjum, Advocate Mr. Saad Fayyaz, Advocate
For the Respondents: (Crl.Ps.600 & 601/20 & R-2 & 3 in Crl.P.1086/20)	Rai Bashir Ahmed, ASC
Date of hearings :	25th Nov. 2020, 1st to 3rd, 8th to 10th, 15th to 17th Dec. 2020, 5th to 7th, 12th to 14th, 19th to 21st, 27th and 28th January 2021.
Date of decision :	28-01-2021

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JUDGMENT

SARDAR TARIQ MASOOD, J.- Through these criminal appeals No. 599, 600 and 601 of 2020 by leave of the Court the State through Prosecutor General Sindh has impugned the judgment dated 2.4.2020 of the High Court of Sindh, Karachi whereby sentence of death and other sentences of imprisonment, awarded by the trial Court to Ahmed Omer Sheikh were set aside and he was convicted under section 362 of the Pakistan Penal Code (**PPC**) and sentenced to seven years imprisonment whereas his co-accused were acquitted of all the charges. The parents of Daniel Pearl have also impugned the same judgment through criminal petitions No. 1085 and 1086 of 2020 against all the respondents. Ahmed Omer Sheikh through criminal appeal No.602 of 2020 has also impugned the judgment against his conviction and sentence of seven years rigorous imprisonment under section 362 PPC.

2. Precise facts of the case are that Fahad Nasim Ahmed, Syed Salman Saqib, Sheikh Muhammad Adil and Ahmed Omar Sheikh (Respondents in Criminal Appeals No. 599, 600, 601 of 2020, Criminal Petition No. 1085 and 1086 of 2020) and Ahmed Omar Sheikh (Appellant in Criminal Appeal No. 602 of 2020) were indicted in case FIR No. 24/20220 registered at Police Station Artillery Maidan, Karachi (South) on 4.2.2002 in respect of the offences under section 365-A of the PPC read with section 7(a) of the Anti-Terrorism Act, 1997 (**ATA**). Subsequently, sections 368, 302, 109, 201, 120-A/34 PPC and sections 7(a), 8(a)(b)(c), 11/A(a)(b)(c), 6(2)(b)(c)(e)(f) and 11/H (3-4), 11/V(1)(a)(b)(2), 11/L(a)(b), 7(a)(b)(2), 11/W(1)(2) and 7 of ATA were added. They were tried by the learned Judge Anti-Terrorism Court Hyderabad,

Division and Mirpurkhas Division in respect of the offences mentioned above. After a full dressed trial, the trial Court vide judgment dated 15.07.2002 convicted Ahmed Omar Sheikh under sections 365-A, 302 and 120-A PPC read with section 6(a) ATA and sentenced him to death under section 7 of ATA, whereas Fahad Nasim Ahmed, Syed Salman Saqib and Sheikh Muhammad Adil were convicted under the same offences but they were sentenced to imprisonment for life. They were directed to pay Rs.5,00,000/- as fine or in default thereof to further undergo five years R.I. All the four accused were also directed to pay Rs.20,00,000/- jointly to be paid by them in equal shares to the widow of Daniel Pearl. The sentences of imprisonment were ordered to run concurrently. Benefit of section 382-B Cr.P.C. was also extended to them.

(i) All the facts of the case and gist of the evidence had already been reproduced by the trial Court in its judgment dated 15.7.2002 which further have been elaborated through the impugned judgment, therefore, in order to avoid duplication and repetition, the facts of the case are not being reproduced.

3. Being aggrieved of the judgment of the trial Court, Ahmed Omar Sheikh filed Special Crl. Anti-Terrorism Appeal No.66/2002 before the High Court of Sindh whereas trial Court also sent confirmation case No.12/2002 for confirmation or otherwise of the death sentence of Ahmed Omar Sheikh. The respondents Fahad Nasim Ahmed, Syed Salman Saqib and Sheikh Muhammad Adil had also filed Spl. Crl. Anti-Terrorism Appeal No.67/2002 against their convictions and sentences. Whereas the State also filed Special Criminal Anti-Terrorism Appeal No.68/2002 for enhancement of sentence of Fahad Nasim Ahmed, Syed Salman Saqib and Sheikh Muhammad Adil from life imprisonment to

death. A Division Bench of the High Court of Sindh at Karachi vide impugned judgment dated 2.4.2020 acquitted Fahad Nasim Ahmed, Syed Salman Saqib and Sheikh Muhammad Adil from all the charges and their convictions and sentences passed by the trial Court were set aside. Ahmed Omar Sheikh was also acquitted from all the charges, however, he was convicted under section 362 PPC and sentenced to seven years R.I. Benefit of section 382-B Cr.P.C. was also extended to him, whereas confirmation reference of his death sentence was answered in negative. Special Criminal Anti-Terrorism Appeal No.68/2002, filed by the State for enhancement of sentence was also dismissed. Hence the State has filed Criminal Appeals No.599 to 601/2020 and Ahmed Omar Sheikh filed Criminal Appeal No.602/2002 by leave of the Court granted on 28.09.2020 to re-appraise the entire evidence. On the other hand, Ruth Pearl and her husband Judea Pearl has also filed Criminal Petitions No.1085 & 1086/2020 against the impugned judgment of the High Court of Sindh.

4. We have heard the learned Special Prosecutor, Prosecutor General, counsel of Ruth Pearl and another, learned counsel for all respondents and learned counsel for appellant Ahmed Omer Sheikh.

5. Ahmed Omar Sheikh and other three were charge sheeted on 22.4.2002 by the trial Court. The first charge was framed against Ahmed Omar Sheikh as under:-

> "that you alongwith absconding co-accused hatched a conspiracy on 11.01.2002 in Room No.411, Akbar International Hotel, Rawalpindi, to abduct a Jewish American citizen, a professional journalist, belonging to the Wall Street General, USA for raising demand of ransom"

6. In order to prove this charge the prosecution mainly relied upon Asif Mehfooz Farooqui (PW-6) and Amir Afzal (PW-7). The

prosecution is quite pertinent that conspiracy was hatched up on 11.1.2002, in Room No. 411, Akbar International Hotel, Rawalpindi. Asif Mehfooz Farooqui (PW-6), was the person who tried to manage a meeting of Daniel Pearl with one Pir Mubarak Shah Jilani. He went with Daniel Pearl and Arif (since tried separately and acquitted subsequently), to the residence of Pir Mubarak Shah Jilani, but it was told to them that the said Pir Mubarak Shah Jilani, after vacating that house had gone away about one month back. He remained in contact with Arif accused and ultimately, allegedly, he alongwith Daniel Pearl and Arif met with Bashir which according to prosecution was Ahmed Omar Sheikh. According to him they remained in Room No.411 for about three hours and the only purpose was to arrange a meeting with Jilani Sahib. During the trial he did not disclose the source that who had referred him to the said Arif. This witness categorically, during cross examination, stated that no conspiracy took place in Room No. 411 on 11.01.2002. He was not even aware of the address of accused Arif. He made improvements while making statement in Court and he was duly confronted. Although he joined the identification parade but he never prescribed any role of conspiracy of Ahmed Omar Sheikh while identifying him in the identification parade. This witness had not uttered a single word of conspiracy on the said date in Room No. 411, rather he denied the factum of hatching of any conspiracy there. Nobody from prosecution had alleged the hatching of conspiracy by the accused person. So the prosecution has failed to establish any conspiracy between Ahmed Omer Sheikh and Muhammad Arif accused regarding the abduction of Daniel Pearl.

7. In order to prove that Ahmed Omar Sheikh stayed in Hotel Akbar International on 11.01.2002 in Room No.411, the prosecution produced Amir Afzal (PW-7), claiming that he was a receptionist at Akbar International Hotel. He produced photo copies of certain documents. On Exhibit 10/1, the name of waiter is not mentioned. On Exhibit 10/2 the position is same and the said column of waiter is also left blank. Even on Exhibit 10/3 the Room number is not mentioned. He admitted that N.I.C. was given by Muzaffar Farooqui @ Ahmed Omar Sheikh but copy of the said ID card was never retained. Even the NIC number was not mentioned in the record. He did not bring the record of the ledger account in the Court. The author of the said documents was not produced. In his statement before the police he had stated that Room No.417 was booked by Muzaffar Farooqui whereas in the Court he claimed that it was Room No.411. He was duly confronted with his previous statement recorded under section 161 Cr.P.C. where Room No.417 was specifically mentioned. He never claimed in his statement under section 161 Cr.P.C. that he could identify Muzaffar Farooqui. He had not stated in his statement under section 161 Cr.P.C. that a foreigner had a meeting with Muzaffar Farooqui. He did not produce any proof of his service in the Akbar International Hotel. He admitted that no statement from the management side was recorded by the police proving his appointment as Receptionist. The said witness also produced some Cash Memos but had not produced the Customer Register where all particulars of the customers staying there including name of customer, his parentage, ID Card number, Room number, time of arrival and departure etc is mentioned. The address of Muzaffar Farooqui is mentioned in Exhibit 10/4 as 18-Nishtar Block,

Lahore. The Cash Memo (Exhibit 10/3) shows that Muzaffar Farooqui was occupying Room No. 5 and not 411. Although the exact address of Muzaffar Farooqui was mentioned on Exhibit 10/4 but the Investigating Officer, Rao Muhammad Aslam (PW-22) did not visit the said address i.e. 18-Nishtar Block, Lahore. The said witness claimed that he was receptionist of Akbar International Hotel, Rawalpindi but on a question he categorically stated that he even does not know the area in which the said Hotel was situated. This answer clearly indicates that a false witness was introduced as receptionist, to prove the factum of conspiracy in Room No. 411 of the said Hotel which was completely denied by Asif Mehfooz Farooqui (PW-6).

(i) Amir Afzal (PW-7) never joined any identification parade to identify Ahmed Omar Sheikh as Muzaffar Farooqui. There is no explanation on record as to why identification parade of Ahmed Omar Sheikh was not arranged through this witness. Non-arranging of such identification parade had lost the veracity of the statement of this witness. Although this witness identified the accused in the Court but identification in the Court has no value because said witness appeared as PW-7 and prior to that six witnesses were examined by the prosecution and on each occasion the accused was brought with open face and the witness had all opportunity during this time to see the accused in Court. Even prior to that the accused was brought many a times before the Court during physical and judicial remand and there is every opportunity to every one to see him with open face. So the identification in the Court, by this witness, has no persuasive value. The prosecution failed to prove any conspiracy between Ahmed Omar Sheikh and his absconding co-accused Arif in Room

No. 411 in Akbar International Hotel, Rawalpindi in presence of Asif Mehfooz Farooqui (PW-7).

8. The definition of criminal conspiracy under section 120-A PPC clearly indicates that two or more persons, if agree to do or cause to be done an illegal act or act which is not legal by illegal means, such an agreement is designated as criminal conspiracy. The punishment for conspiracy is given under section 120-B of the Pakistan Penal Code. So it is to be established by the prosecution that prior to the commission of offence two or more persons had entered into an agreement for committing an un-lawful offence. As already discussed, the statement of witness does not indicate that before hatching the conspiracy the accused entered into an agreement, written or oral, to do an illegal act and the crime was committed in pursuance of a conspiracy by the accused. To constitute a conspiracy meeting of two or more persons for doing an illegal act through illegal means is the primary condition. To ascertain conspiracy it has to be seen and keep in mind by the Court that the evidence, concerning each and every circumstance, must clearly be established by reliable evidence. There should be a prima facie evidence affording a reasonable ground for the Court to believe that two or more persons are member of the conspiracy and conspiracy consists not merely in the intention of two or more persons but in an agreement of two or more persons to do an unlawful act.

9. In this case, the other person Hashim @ Arif S/o Qari Abdul Qadeer, who allegedly was one of the conspirator in Room No. 411 alongwith Muzaffar Farooqui, was declared proclaimed offender when Ahmed Omar Sheikh and other three accused were being

tried. It was the prosecution case at that time that said Arif was the person who was part of the agreement with Ahmed Omar Sheikh in hatching of a conspiracy. The learned counsel appearing on behalf of the State admitted that said Arif was subsequently arrested and was tried separately and on 23.10.2014, he was acquitted by the trial Court. The learned Prosecutor General, present in Court, categorically concedes that no appeal against his acquittal was ever filed. So his acquittal attained finality and story of hatching conspiracy of Ahmed Omar Sheikh @ Muzaffar Farooqui with him is falsified. The learned Division Bench of the High Court while discarding the charge of conspiracy against all the accused persons, had rendered valid reasons which are not open to any exception.

(i) Although certain judgments qua conspiracy have been produced before us from either side but it is now settled that each criminal case is to be decided having regard to its own peculiar facts and circumstances. A test to be essentially applied in one case may absolutely be irrelevant in another, as the crimes are seldom committed in identical situations. The criminal cases are to be decided on their peculiar facts and circumstance as such the rules laid down in the earlier cases cannot be applied in the subsequent cases in the '*Omnibus*' manner. In this behalf reliance can be made upon the cases of ***Khan alias Khani and another vs. the State*** (2006 SCMR 1744), ***Imtiaz Ahmad vs. the State*** (2001 SCMR 1334), ***Syed Saeed Muhammad Shah and another vs. the State*** (1993 SCMR 550) and ***Allah Wadhayo and another vs. the State*** (2001 SCMR 25).

10. According to prosecution and the FIR the occurrence took place on 23.1.2002 whereas report was lodged on 4.2.2002 at

11:45 pm. i.e. the last hour of the day. Prior to that Mrs. Daniel Pearl has received email on 27-1-2002, including photographs showing her husband held in detention. She also received another email subsequently on 30-1-2002 through which her husband was threatened to kill within 24 hours, if the demands were not fulfilled. She did not report the matter when she received emails containing photographs of her husband while he was held in detention or even when she was threatened that her husband would be murdered within 24 hours. Her husband was under the thick clouds of danger but she kept quite for long twelve days, which cannot be overlooked merely because of gravity of the offence. Mrs. Daniel Pearl did not lodge the crime repot promptly and the matter was deferred till 4.02.2002, indicating that till that time consultation and deliberation was going on and FIR was chalked out after such consultation and deliberation, loosing its evidentiary value and creating serious doubt upon the prosecution story.

11. It was the case of Nasir Abbas (PW-1) that he on the asking of Faisal Afridi, another taxi driver, picked up a foreigner from Zam Zama street who was standing in front of his bungalow, where two ladies were also present, out of them one was foreigner, showing that Daniel Pearl was taken away from outside of his house by the Taxi Driver Nasir Abbas (PW-1) in presence of the complainant (Mst. Daniel Pearl) and another lady but surprisingly the FIR, which was chalked out on 04.02.2002, is silent regarding this episode. According to Nasir Abbas (PW-1) he had dropped the said foreigner in front of Village Restaurant after *Maghrab* prayer at about 7:00 pm. Subsequently on 5.2.2002 said Nasir Abbas (PW-1) while making statement under section 161 Cr.P.C. claimed that in

his presence the said foreigner sat in a Toyota Corolla car after shaking hand with another person who had de-boarded from the said Toyota Corolla car. He categorically stated that on the following day i.e. 24.1.2002, he narrated all these facts to Mrs. Daniel Pearl, but surprisingly, the fact of shaking hand with the person who had de-boarded from Toyota Corolla car and going away with him in the said car is not mentioned by Mrs. Daniel Pearl while lodging the FIR. This aspect of the case clearly indicates that the Toyota Corolla car and shaking hand of Denial Pearl with the person who de-boarded from said Toyota Corolla was an afterthought story which was invented on 5.2.2002 i.e. after thirteen days of alleged abduction. It is also a circumstance that despite receiving threatening emails and photographs showing the captivity of Daniel Pearl, she did not lodge the report promptly and the matter was reported to police on 4.2.2002. Non-mentioning of important facts while lodging the FIR is also a circumstance indicating that subsequently false story was fabricated. Had the story of going of Daniel Pearl with a person who de-boarded from a Toyota Corolla car was in existence then the same must have been mentioned in the FIR particularly when Nasir Abbas (PW-1) claimed that he had given the details of this episode of last seen to Mrs. Daniel Pearl. The last seen evidence was available with Mrs. Daniel Pearl, well before lodging the FIR but was not mentioned therein which create serious doubt regarding this piece of evidence.

12. It is a circumstance that it was Faisal Afridi, another Taxi Driver, who booked the Taxi of Nasir Abbas (PW-1) as family of Daniel Pearl need two Taxis, one for Daniel Pearl and the other for Mrs. Daniel Pearl and another lady. Said Faisal Afridi never came

forward to make statement to this affect. His evidence was withheld by the prosecution and an adverse presumption can be drawn against prosecution in view of Article 129(g) of Qanoon-e-Shahadat Order, 1984 (**Order 1984**).

(i) It was the case of the prosecution that it was Faisal Afridi who after 23-1-2002, when Daniel Pearl went missing, contacted Nasir Abbas (PW-1). Nasir Abbas categorically admitted that when Faisal Afridi asked him about the whereabouts of said foreigner, he did not disclose the facts of last seen to Faisal Afridi. Had Nasir Abbas seen departure of Daniel Pearl with the accused in Toyota Corolla car, he must have told this fact to Faisal Afridi upon his inquiry. So it is quite clear that the said story of last seen was introduced on 5.2.2002, after arresting Nasir Abbas as suspect and thereafter his statement under section 161 Cr.P.C. was recorded regarding last seen. So the last seen evidence was not in existence, prior to 5.2.2002, that was the reason that same was not disclosed to any one by Nasir Abbas (PW-1) prior to 5.2.2002 and this fact is further strengthened from the fact that this piece of evidence is missing in the FIR, creating serious doubt regarding this piece of evidence.

13. Learned counsel appearing for the parents of Daniel Pearl states that the delay in lodging the FIR can be explained by Mrs. Daniel Pearl and non-mentioning of the last seen evidence in the FIR, is also explainable by her but surprisingly the evidence of Mrs. Daniel Pearl was also withheld. She was an important witness. She is the lady who allegedly received emails on 27.1.2002 and 30.1.2002. She did not explain in the FIR as to from which Laptop/Computer she received the said emails. Allegedly she handed over the copies of the said emails to the police and same

were taken into possession through a *Mushirnama*, but surprisingly said *Mushirnama* was not signed by her. The FIR is silent regarding the above queries regarding emails. She never produced the Laptop/Computer through which she received the emails. The prosecution even did not produce any person who might have delivered the said emails to her. So withholding her evidence and her non-appearance is a circumstance indicating that till lodging of FIR the story of last seen was not in existence and till that time the only information with Mrs. Daniel Pearl was that the taxi driver dropped him in front of Village Restaurant. It is also a circumstance that during investigation the Police Officer, especially the Investigating Officer, tried to meet Mrs. Daniel Pearl but could not make contact with her. Even he visited the house of Mrs. Daniel Pearl but she did not come out from her house. So one thing is quite clear that subsequently she did not join the investigation despite many efforts made by Hameedullah Memon/IO (PW-23) to join her into the investigation. It was only Mrs. Daniel Pearl who could have produced the source or Gadget/Computer on which the said email was received. Her Computer or Computer of any other person through which said emails were received to her, could have led to the Computer from which these emails were originated and were received. She did not come forward even to join the investigation to support the prosecution version. During trial she made request that her statement be recorded through commission. She ensured that she will appear before the Court with the permission of the doctor, but it was the prosecution who ultimately given her up under the pretext of her pregnancy. The accused party has also filed application under section 540 Cr.P.C. for summoning the said

witness to which prosecution opposed and ultimately she was given up. The prosecution can made application for postponing the trial till the recovery of Mrs. Daniel Pearl and her availability but even such effort was not made. She was the most important witness. She being complainant could have explained that how she has received the emails, from where she collected those emails, she could also produce the Computer through which she or anyone else had received the emails. Although she handed over the said emails to the Police but she did not come forward to support the said facts and even she did not sign the *Mushirnama* of said emails. The said star witness, after lodging of the FIR and handing over the emails to the police, never joined the investigation and never supported the case of prosecution and her evidence was totally withheld by the prosecution. An adverse presumption can easily be drawn against prosecution that had she appeared in Court, she would have not supported the prosecution version. The delay in lodging of the FIR for 12 days and withholding the evidence of such important witness, are the circumstances, creating serious doubt on the prosecution story, qua last seen and abduction.

14. So far abduction of Daniel Pearl is concerned the prosecution has mainly relied on two witnesses namely Nasir Abbas (PW-1) and Jameel Yousaf (PW-2). Nasir Abbas claiming himself to be a taxi driver and denied to be a police official but Hameedullah Memon (PW-23) categorically mentioned while making statement in the court that he searched H.C. Nasir Abbas, driver. This fact clearly indicates that prosecution produced a police employee by posing him as a taxi driver and that was the reason he was not aware of locations of certain places which being

a taxi driver he should have known. He admitted that he was not aware of the location of Laxon Building. He again said that he was not aware of the location of CPLC Secretariat. This fact clearly indicates that he was a made up taxi driver by the prosecution. It is a circumstance that he was arrested on 5.2.2002 and thereafter his statement under section 161 Cr.P.C. was recorded as a witness in this case. He being a prosecution witness appeared as PW-1 and claimed that he dropped a white passenger in front of Village Restaurant and on the rear side of Metropole Hotel. According to him, he dropped the said person at 7:00 pm. He also admitted that during those days *Maghreb* prayer was offered at about 6 pm. So inference can be drawn that darkness had prevailed. It was the duty of the prosecution to show the source of light at the place of occurrence, in the *Mushirnama* which was prepared on 5.2.2002 after about twelve days of dropping of foreigner on the rear side of the Metropole Hotel. The said *Mushirnama* is also silent regarding any source of light at the place of occurrence. No site plan was prepared of the place of alleged abduction to indicate any source of light there. Although the said witness improved his version while making a volunteer statement that light was available there but this improvement was an attempt to cover up said lacuna. He was never shown the photograph of Daniel Pearl to identify as to whether the said foreigner was actually Daniel Pearl or not. He did not disclose the feature of the person, with whom foreigner had gone, to Mrs. Daniel Pearl or anyone else, hence any subsequent identification has lost its value as held in the case of ***Mian Sohail Ahmed and others vs. the State and others*** (2019 SCMR 956) . The claim of this witness till 5.2.2002 was that he simply dropped the foreigner in front of Village Restaurant and nothing else. He did not

disclose this important piece of evidence to Faisal Afridi when he inquired from him on 24.1.2002 about the foreigner. He simply told him that he dropped him in front of Village Restaurant. It is a circumstance that till 4.2.2002 the stance of Mrs. Daniel Pearl was that Nasir Abbas told him that he dropped the foreigner in front of Village Restaurant and she mentioned the same fact after about twelve days of the alleged abduction and did not mention this important piece of evidence of last seen in the company of the accused in the FIR. If any person in routine inquires from any person regarding departure of a person whom he had taken away then the facts that where he dropped him or from where he was taken away by any other person, must have been disclosed by that person. As this important piece of evidence was not mentioned in the FIR so out of necessity Nasir Abbas claimed that he had disclosed the evidence of last seen to Mrs. Daniel Pearl. Had such disclosure was made, Mrs. Daniel Pearl must have mentioned the same in the FIR. Non-mentioning of the important piece of evidence of last seen in the FIR clearly negated the version of Nasir Abbas regarding last seen evidence which for the first time was recorded in his statement on 5.2.2002 that too after his arrest in the police station. So no reliance can be placed on such piece of evidence. If he had seen the foreigner going alongwith someone in a Toyota Corolla car, he should have informed this fact to Faisal Afridi who, for the first time, contacted him and asked regarding the whereabouts of said foreigner. Had the foreigner, as alleged by prosecution, been abducted or taken deceitfully in presence of this witness, it would have been expressly mentioned in the FIR as while lodging the FIR Mrs. Daniel Pearl also referred the disclosure of Nasir Abbas regarding dropping of foreigner in front of Village

Restaurant. The arrest of Nasir Abbas prior to his making statement under section 161 Cr.P.C. also indicate that he became a false witness under the coercion and threat by the investigating officer and he also lost his credibility on this score only.

(i). Daniel Pearl before dropping in front of Village Restaurant had visited the office of Jameel Yousaf (PW-2) and there he received calls on his cell phone and he assured the caller on the telephone that he is aware of his appointment at 7:00 pm. He confirmed his appointment and told the caller on the other side that he was very close to the office of the caller. So the said call clearly indicates that from the office of Jamil Yousaf (PW-2) Daniel Pearl had to go to some office where he had an appointment. Jamil Yousaf (PW-2) collected the call data from Mobilink and got information that the said calls were made from mobile phone having number 0300-2170244. The alleged call data of Daniel Pearl shows that he also received a call from 7:11 pm to 7:15 pm (after his alleged abduction) from an unknown number and the prosecution never investigated as who was on the said unknown number which normally is used by the agencies. Jamil Yousaf (PW-2) claimed that he inquired from Mrs. Daniel Pearl regarding phone number 0300-2170244 and according to her the said number was of Imtiaz Siddiqui, a proclaimed offender having family relations, as his mobile number was even known to the wife of Daniel Pearl. The said facts clearly indicate that Daniel Pearl had an appointment with Imtiaz Siddiqui in his office which was near to the office of CPLC and who was in contact with Daniel Pearl. So the story of abduction by an unknown person through deceitful mean was never brought on the surface prior to twelve days of his alleged abduction which fully indicate that said piece of evidence was

created on 5.2.2002, that too after the arrest of Nasir Abbas (PW-1) as suspect so no reliance can be placed on the statement of Nasir Abbas (PW-1) for conviction with regard to abduction, as done by the Division Bench of the High Court. The above important aspects of the case have totally been ignored by the High Court while convicting Ahmed Omer Sheikh under section 362 PPC which is not a penal section rather it was just a definition of abduction. The High Court had not pinpointed the penal section under which the conviction was passed as under section 362 PPC no sentence was provided. So convicting and sentencing under section 362 PPC was also not warranted rather illegal because prosecution failed to prove the alleged abduction of Daniel Pearl.

15. The prosecution also alleged that Denial Pearl was subsequently murdered and the charge was also framed to that extent. For proving the murder one video clip/tape was produced during the evidence through John Molligan (PW-12). According to him he was briefed in connection with this case on 01-2-2002. He claimed that said video clip/tape (Article-1) was delivered to him in Sheraton Hotel, Karachi, by someone. He had not disclosed the source, even the nationality of the said source was not disclosed by him. The original video clip/tape was never produced during the trial and it was Johan Molligan (PW-12) who prepared four copies of the said video clip/tape and delivered one copy to the investigating agents. Admittedly in this video clip/tape the pictures of respondents are not shown, only one hand was shown while slaughtering the neck of Denial Pearl and then holding his head. The said hand does not lead to identity of anyone. Even otherwise, the said video does not lead to any identity of the culprits. The said video clip/tape was delivered to Johan Molligan (PW-12) on

21.2.2002, when all the four accused were already in police custody. It is a circumstance that no forensic analysis of the said video clip/tape was ever carried out nor any report of expert was ever produced by the prosecution. If original video clip/tape was delivered to the Investigating Officer then the forensic test could have been done. The original clip/tape was willfully withheld by John Molligan (PW-12) and an adverse presumption can be drawn that the said clip was the result of camera trick. It was not established by the prosecution that as to when and by whom the original video clip was prepared, so there is possibility that the same was prepared in the lab or some film studio. In absence of any forensic report about the genuineness or otherwise of the said video clip, no reliance can be placed on such piece of evidence as held in the case of ***Asfandyar and another vs. Kamran and another*** (2016 SCMR 2084).

(i) The guidelines to prove an audio or video in the Court are elaborated in the case of ***Ishtiaq Ahmed Mirza and others vs. Federation of Pakistan*** (PLD 2019 SC 675). After referring numerous judgments on the point following guidelines were incorporated in the said judgment. Relevant para is reproduced as under:

> ***"****11. The precedent cases mentioned above show that in the matter of proving an audio tape or video before a court of law the following requirements are insisted upon:*
>
> * *No audio tape or video can be relied upon by a court until the same is proved to be genuine and not tampered with or doctored.*
> * *A forensic report prepared by an analyst of the Punjab Forensic Science Agency in respect of an audio tape or video is per se admissible in evidence in view of the provisions of section 9(3) of the Punjab Forensic Science Agency Act, 2007.*
> * *Under Article 164 of the Qanun-e-Shahadat Order, 1984 it lies in the discretion of a court to allow any evidence becoming available through an audio tape or video to be produced.*

* *Even where a court allows an audio tape or video to be produced in evidence such audio tape or video has to be proved in accordance with the law of evidence.*
* *Accuracy of the recording must be proved and satisfactory evidence, direct or circumstantial, has to be produced so as to rule out any possibility of tampering with the record.*
* *An audio tape or video sought to be produced in evidence must be the actual record of the conversation as and when it was made or of the event as and when it took place.*
* *The person recording the conversation or event has to be produced.*
* *The person recording the conversation or event must produce the audio tape or video himself.*
* *The audio tape or video must be played in the court.*
* *An audio tape or video produced before a court as evidence ought to be clearly audible or viewable.*
* *The person recording the conversation or event must identify the voice of the person speaking or the person seen or the voice or person seen may be identified by any other person who recognizes such voice or person.*
* *Any other person present at the time of making of the conversation or taking place of the event may also testify in support of the conversation heard in the audio tape or the event shown in the video.*
* *The voices recorded or the persons shown must be properly identified.*
* *The evidence sought to be produced through an audio tape or video has to be relevant to the controversy and otherwise admissible.*
* *Safe custody of the audio tape or video after its preparation till production before the court must be proved.*
* *The transcript of the audio tape or video must have been prepared under independent supervision and control.*
* *The person recording an audio tape or video may be a person whose part of routine duties is recording of an audio tape or video and he should not be a person who has recorded the audio tape or video for the purpose of laying a trap to procure evidence.*
* *The source of an audio tape or video becoming available has to be disclosed.*
* *The date of acquiring the audio tape or video by the person producing it before the court ought to be disclosed by such person.*
* *An audio tape or video produced at a late stage of a judicial proceeding may be looked at with suspicion.*
* *A formal application has to be filed before the court by the person desiring an audio tape or video to be brought on the record of the case as evidence.*"

In view of above guidelines, in the present case, the piece of evidence i.e. video clip is not worthy of reliance and the High Court has rightly discarded this piece of evidence while assigning valid reasons.

(i) The learned counsel for parents of Daniel Pearl argued that the defence counsel summoned the body of Daniel Pearl when it was flashed in the news paper that his dead body was recovered from a grave in a courtyard. Although the said postmortem report was summoned on the application of the defence but the said postmortem report was of an unknown person whose parentage and other particulars were not known. It is also not brought on record by the prosecution that as to how and on whose pointation the said dead-body was recovered. No effort was made by the prosecution to produce the doctor who conducted the postmortem and prepared the report. At this stage, learned counsel for parents of Daniel Pearl cannot claim that the flaws and lacunas left by prosecution due to their negligence be filled by invoking jurisdiction under section 428 Cr.P.C. The Courts remain impartial and they are not meant to fill up the lacunas/gaps and other infirmities left by either party. So prosecution remained fail to establish the factum of murder through cogent evidence.

16. So far the confession or admission of Ahmed Omar Sheikh before the police personnel i.e. Faisal Noor, Inspector CIA (PW-4), Ather Rasheed Butt, DSP (PW-5), Rao Muhammad Aslam, Inspector (PW-22) and Hameedullah Memon, Inspector (PW-23) is concerned, the same was objected to when these witnesses appeared during trial and claimed that accused Ahmed Omar Sheikh made admission regarding the guilt of offence in their presence when he was produced before Mr. Arshad Noor Khan, Administrative Judge, Anti-Terrorism Court Karachi, on 14.2.2002. According to them, the accused disclosed these things to the judge in their presence. The objection regarding Articles 38 and 39 of the

Order 1984, was not decided then and there. All the four witnesses who were police officials claimed that the accused Ahmed Omar Sheikh while in police custody made confession in their presence. Articles 38 and 39 of the Order 1984 are quite clear on the subject and such admission, in view of the above said Articles, is inadmissible. Both the Articles of the Order 1984 are re-produced as under : -

> **"38. Confession to police-officer not to be proved.-** No confession made to a police-officer shall be proved as against a person accused of any offence.
>
> **39. Confession by accused while in custody of police not to be proved against him.-** Subject to Article 40, no confession made by any person whilst he is in the custody of a police-officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.**"**

17. In the present case admittedly, the admission of Ahmed Omer Sheikh was before the police and whether he made any admission before the Administrative Judge, is not supported by the order of the judge nor the said Judge came forward to confirm such admission. Admittedly, at that time, he was in police custody and was handcuffed. Any confession, even recorded under section 164 Cr.P.C. will become invalid if the accused is produced before the Magistrate remained in handcuff while making such confession.

18. The plain reading of the above quoted Articles clearly indicate that confession made by any person while he is in custody of the police officials shall not be proved as against a person/accused of any offence. Learned counsel for parents of Daniel Pearl tried to argue that in the presence of the Administrative Judge the said words regarding admission were uttered by the accused but the orders on the remand paper, passed by the learned Administrative Judge does not find mention

any of such admission made by Ahmed Omar Sheikh. The said Administrative Judge was never produced by the prosecution to prove such admission or confession. Although the order written by the Administrative Judge contains certain other conversation made by Ahmed Omar Sheikh with the Judge as he asked the learned judge for providing him medical treatment including the medicines, but order is silent regarding any utterance of Ahmed Omar Sheikh qua his admission. Earlier the defence filed an application to the High Court for transfer of the case from the Court of Mr. Arshad Noor Khan as according to depositions of PW-4, PW-5, PW-22 and PW-23, the said Judge became a witness. The prosecution conceded before the High Court and the case was transferred to another judge. Application for summoning of the said judge was filed to make statement in the Court. The said Administrative Judge (Mr. Arshad Noor Khan) was summoned and he appeared before the Court on 22.5.2002, for making statement but the prosecution refused to produce him as witness and categorically stated that they do not want to produce him. Learned counsel for parents of Daniel Pearl tried to argue that in view of Article 4 of the Order 1984, the said witness was not produced. The said witness while granting remand was acting as a Magistrate and in that eventuality he was subordinate to the trial judge. The trial Judge has summoned him for evidence, in that situation, giving him up by the prosecution under the garb of Article 4 of the Order 1984, amounts to withholding a most important evidence and under Article 129(g) of the Order 1984, an adverse presumption can be drawn against the prosecution and it can easily be presumed that he would have not supported the version put forwarded by PW-4, PW-5, PW-22 and PW-23. Even Article 4 of the Order 1984, does

not bar to appear as witness but give an opportunity to the Magistrate or the Judge to take privilege not to answer any question put to him and then Article 4 of the Order 1984 will be operative. Otherwise, if he does not claim privilege he can give evidence as there is no bar under the said Article for making statement. He even without any permission can be examined as to the matter which occurred in his presence while he was so acting as Magistrate or Judge. So the evidence of Administrative Judge was willfully withheld by the prosecution with malafide and not bonafide as claimed by the learned counsel for the parents of Denial Pearl. Non examination of Mr. Arshad Noor Khan and non-mentioning of any admission or confession in the remand order is sufficient to discard the evidence of PW-4, PW-5, PW-22 and PW-23. Articles 38 and 39 of the Order 1984, rendered the statement of these four PWs, inadmissible to the extent of alleged admission/confession of Ahmed Omar Sheikh.

19. In this case the date of arrest of Fahad Nasim Ahmed, Syed Salman Saqib and Ahmed Omar Sheikh remained controversial as according to the Investigating Officer the emails were sent from the system/link provided to Sheikh Naeem (PW-14) and on the night of 10/11 February 2002, on the pointation of said Sheikh Naeem (PW-14), Fahad Nasim Ahmed was arrested and a DELL laptop with hard-disk alongwith other articles i.e. copies of email two manuscripts in Urdu and English etc. were recovered from his residence and on the same night another accused namely Syed Salman Saqib was arrested and certain recoveries were effected. The claim of the Investigating Officer regarding the arrest of the accused persons and recovery of DELL Laptop on 11.2.2002 is totally negated from the statement of Ronald Joseph (PW-8) who

categorically stated that the said Laptop was available in the US consulate on 4.2.2002 and he obtained the same on the same day from there. The report of said Ronald Joseph (PW-8) clearly indicate that he started examining the said Laptop on 7.2.2002. So how the Laptop which was already available in the US consulate on 4.2.2002 could be recovered from Fahad Nasim Ahmed on 11.2.2002. In order to meet the contradiction regarding the arrest of the accused persons learned Special Prosecutor General and the Prosecutor General argued that Ronald Joseph (PW-8) has given a wrong date inadvertently. This argument has no force as Ronald Joseph, in his report, categorically mentioned that Laptop was delivered to him from the lock-room of the US consulate and he received the same from there on 4.2.2002. Even in his expert report, it is specifically mentioned that he started examining the said Laptop on 7.2.2002. So one thing is quite clear that much prior to the arrest of Fahad Nasim Ahmed and alleged recovery of Laptop the same Laptop was available with Ronald Joseph (PW-8). Learned counsel for the parents of Daniel Pearl advanced another argument which was contrary to the prosecution version. According to him actually the accused were arrested on 4.2.2002 and Laptop was recovered from them but the Police Officer has shown their arrest late i.e. 11.2.2002. On query, he admitted that although accused were in illegal detention but in such high profile case such illegal detention can be ignored. This argument of the learned counsel is sufficient to throw out the whole prosecution case because none of the witnesses has ever claimed that the accused were arrested on 4.2.2002 or the Laptop which was used for sending emails was ever recovered from the accused on 4.2.2002 or prior to that. Even the arrest of Ahmed Omar Sheikh

shown as 13.2.2002 is also doubtful as according to Ahmed Omar Sheikh he surrendered himself on 6.2.2002 at Lahore and later he was shifted to Karachi on 12.2.2002. The news paper clipping and TV footages indicate that he was arrested in Lahore. The version put forward by Ahmed Omar Sheikh gets support even from the statement of prosecution witnesses who admitted that the arrest of the accused in Lahore was published in the news papers. The prosecution's own witness John Molligan (PW-12) admitted that he saw all the four accused present in the CID centre on 11th or 12th February 2002. The relevant portion is reproduced here under:

> "I saw four accused person who were present at CID Centre, who are present in this court today. But I saw them at about 11 or 12th Feb. 2002."

This admission on the part of the prosecution's own witness totally contradicts the claim of the Investigating Officer who stated that on the night of 13th February 2002, he arrested Ahmed Omar Sheikh while wondering near the airport. The claim of Ahmed Omar Sheikh that he was brought through PIA flight from Islamabad was not rebutted by the prosecution by producing the PIA flight inquiry and list of passengers. Two DWs were produced by Ahmed Omar Sheikh to establish his arrest at Lahore. The prosecution story is also not believable that the person who was required by the police was found wondering around the airport area at night time while keeping incriminating documents i.e. email etc with him.

20. As already discussed the arrest of the accused persons were shown subsequently and prior to that they were kept in illegal confinement as claimed by the learned counsel for the parents of Daniel Pearl but this fact cannot be ignored simply on the logic of being a high profile case. Article 10(2) of the Constitution of the Islamic Republic of Pakistan (**Constitution**) clearly mandate that

every person who is arrested and detained in custody shall be produced before the Magistrate within a period of twenty-four hours of such arrest and no such person can be detained in custody beyond the period without the authority of the Magistrate. So while keeping the accused persons in illegal detention, the prosecution had violated the fundamental rights, constitutional mandate and law. Due to this illegal detention of accused persons, the recoveries which were planted subsequently are negated from the statement of Ronald Joseph (PW-8) and John Molligan (PW-12) and have lost its value.

21. The prosecution had mainly relied upon the judicial confession of Fahad Nasim Ahmed and Syed Salman Saqib recorded under section 164 Cr.P.C. Admittedly, the said confessions were retracted and the Court has to see whether such retracted confessions have been made voluntarily without any inducement, promise or coercion and whether the object of making such confession was to state the truth. The confession would be voluntarily if it was made without any threat, inducement, promise, torture etc. In the present case, admittedly, accordingly to the prosecution's own case, the statements under section 164 Cr.P.C. were recorded after 17/18 days to the extent of Syed Salman Saqib and about 10/11 days of the arrest of Fahad Nasim Ahmed and if keeping in mind the date of arrest as 4.2.2002, as argued by the learned counsel for the parents of Daniel Pearl, then this delay will be 25 days to the extent of Syed Salman Saqib and 17 days to the extent of Fahad Nasim Ahmed. This delay by itself is indicative of the fact that the confessional statements were not made voluntarily. If the object of the accused person to tell the truth and they were volunteered to make such statement the same

must have been recorded on the first or second day of their arrest. Keeping them in such long detention clearly made both the retracted judicial confession doubtful and non-voluntarily.

(i) Admittedly their statements were recorded with a delay of more than 17/18 days of their illegal confinement. Such long detention that too illegal, is sufficient to discard the confessional statements as the principle that longer police custody of an accused lesser the evidentiary value of his confession, will apply in this case. This delay has not been explained by the prosecution. All the learned counsels appearing on behalf of the prosecution were unable to explain as to why such confessions were not recorded on the day first of their arrest.

(ii) The complaint of torture by one of the accused to the Magistrate and reasons of making confession in order to save himself or in order to go jail, are sufficient that the confessions were not voluntarily. From the perusal of the confessional statement of both the accused we are satisfied that the fear of police was not removed from the mind of the accused and the confession made by them is not free from extraneous influence such as threat, promise or inducement. The confessional statements were not made voluntarily and suffer from various defects and infirmity as noted by us and confessional statements have been retracted which are also enough to make them involuntarily and diminish its intrinsic value.

(iii) It was the duty of the Magistrate who recorded the confessional statement to remove the impression of fear of torture by the police from the mind of accused before recording such statement. Although few questions were put to Fahad Nasim

Ahmed but certain mandatory questions have not been asked from him. Fahad Nasim Ahmed on a question categorically mentioned that he was in the police custody for the last 13/14 days. A specific question as to which circumstance induced him to record such confession. He categorically stated that in order to save himself he was making such statement. This answer clearly depicts that he was not making the statement voluntarily, to bring on record the truth rather he was making statement under compulsion and fear in order to save himself. Relevant answer in Urdu is reproduced as under :-

"میں اپنے بچاؤ کی خاطر یہ بیان دینا چاہتا ہوں"

This answer clearly manifests that he was making the statement under the threat to his life or liberty or under promise for sorting him if he makes such statement. So the ingredient under Article 37 of the Order 1984, clearly emerged from the above mentioned answer making the confession irrelevant. The relevant Article is reproduced as under:

> ***37. Confession caused by inducement, treat or promise, when irrelevant in criminal proceedings.-*** *A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil or a temporal nature in reference to the proceedings against him."*

It appears from the answer that in order to make such statement he would gain any advantage, which in the present case is apparent when he answered that he wants to make statement in order to save him. So the whole confession of Fahad Nasim Ahmed only by this sentence becomes irrelevant. Admittedly the accused

were produced before the Magistrate after many days of their arrest. In order to remove the fear of the police and the apprehension that he may not be handed over again to the same police. A mandatory question was formed by this Court in may judgments so that the fear of remanding him back to the police should be removed but even such question was not asked from the accused person and the impression that he will again be handed over to the same police had not been removed by the Magistrate before recording the said confession. The Magistrate admitted that she had not told the accused whether he makes or does not make confession he will not be handed over to the same police. So the fear of the police and remanding him back to the same police was hanging as a sword upon the accused Fahad Nasim Ahmed. There is no explanation as to why such impression was not removed from the mind of the accused. Although it is the duty of the trial Court, appellate or this court to see as to whether the confession was voluntarily or not but in this case as the Magistrate had seen the accused and had received the answer that accused was making statement in order to save himself, she admitted that the said confession was not voluntarily and she herself volunteer that her answer was in accordance with the circumstances of the case. It is prosecution's own witness who said that the said confession was not voluntarily, even then she was not declared hostile.

22. At the end of the certificate the Magistrate Ms. Iram Jehangir mentioned that she was satisfied that the confession made by the accused was voluntarily for the following reasons, but surprisingly no such reasons were mentioned by her. That was the reasons she, in the Court, had categorically stated that the confession was not voluntarily. So no reliance can be placed on such retracted

confession which on the face of it is the result of inducement, promise or threat etc.

23. So far confession of Syed Salman Saqib is concerned, his arrest was shown by the police on 11.2.2002 but when the Magistrate put him question regarding his incarceration he told that he was in the police custody since 4.2.2002. On a question whether he had been tortured or maltreated, he categorically stated that he had been beaten but not at that time. So the torture upon him during custody of police, established from the said answer, make the confession irrelevant as mentioned in Article 37 of the Order 1984. Even the learned Magistrate admitted that if a confessing accused say that he was beaten by the police, such confession is not correct and is liable to be discarded. She categorically stated that the accused told her that he was beaten and maltreated but not on that day. The accused had taken a specific stance that he was beaten. The Magistrate at page No. 2 had mentioned that the body of the accused was examined with his consent and it was found that ....." but the said column was left blank. So the observation regarding mark of violence etc was totally withheld and the said column was left blank. As already been discussed, it was the duty of the Magistrate to ensure the accused before recording his confessional statement that his body will not be delivered back to the police if he makes or does not make any statement. In this case no such assurance was given to the accused. So the impression of torture which he had already faced and the fear of further torture at the hands of the police were not removed. Question was put to the accused as to which circumstances were inducing him to make confession, the reply was that he wants to go jail. So the object of

the accused was not to tell truth but to go to jail in order to avoid further torture and maltreatment at the hands of the police. Even then the Magistrate did not assure him that if he will not make statement, he will not be handed over to the police.

24. The argument of the learned counsel for prosecution that the guidelines given by this Court are directory in nature and are not mandatory. This Court in the case of ***Azeem Khan vs. Mujahid Khan*** (2016 SCMR 274) had enunciated the following principles of law and categorically stated that Magistrate is required to observe all these mandatory precautions and observed as under : -

> *".....the Recording Magistrate has to essentially observe all these mandatory precautions. The fundamental logic behind the same is that, all signs of fear inculcated by the Investigating Agency in the mind of the accused are to be shedded out and he is to be provided full assurance that in case he is not guilty or is not making a confession voluntarily then in that case, he would not be handed over back to the police....."*

The guidelines given by this Court in numerous judgments have binding effect upon all the courts below in view of Article 189 of the Constitution.

25. The impression of fear was not removed from the mind of both the accused persons and according to the Magistrate it was not mentioned in the printed proforma, hence they were not told "not to fear". This Court the case of ***Intikhab Ahmed Abbasi and others vs. the State and others*** (2018 SCMR 495) had already depreciated recording of judicial confession on printed proforma, containing questionnaire. This was depreciated because it amounts to filling the blanks and not in accordance with the requirement of law and rules. Even after recording the alleged confessional statement of these accused, the Magistrate had mentioned that the confession made by the accused is voluntarily for the reasons as

follows but no such reason or ground for believing the confession voluntarily was incorporated by the Magistrate. She also admitted as under: -

> *"It is fact that in the confession the accused has remained in police custody for a month and he wants to go to the jail it makes believing that the confession is not voluntarily."*

So the circumstances of both the confessions, are quite clear that the confessions were not made voluntarily. The High Court had discarded both the judicial confessions of Fahad Nasim Ahmed and Syed Salman Saqib and alleged admission of Ahmed Omar Sheikh, before police officials and for doing so the High Court had given valid reasons which are not open to any exception.

26. In this case the recovery of Laptop through which the emails were sent to Mrs. Daniel Pearl was affected on the night of 11.2.2002 from the house of Fahad Nasim Ahmed. Admittedly the Laptop of Mrs. Daniel Pearl or any one else on which these emails were received were not traced out by the police. Even it is not known as to who delivered the said email to Mrs. Daniel Pearl if she had not received the emails on her own Laptop. In order to prove the recovery of Laptop the Investigating Officer claimed that it was Sheikh Naeem (PW-14) who pointed out the house of Fahad Nasim Ahmed on the night between 10/11.2.2002 and he also got recovered a scanner and a hard drive. Muhammad Ali (PW-19) who was a computer expert, working in Anti Car Lifting Cell in Karachi claimed that he received the Laptop and two emails at 1:00 pm. on 11.2.2002, from the Investigating Officer for examination. Muhammad Ali (PW-19) stated that as he was not having the required equipments so he was directed by his superiors to handover the Laptop to US consulate as FBI Officer had arrived to inspect the same. According to him he delivered the said Laptop on

12.2.2002 to US consulate through a letter. This Laptop was having most importance, as according to FBI forensic expert, through this Laptop vital information was retrieved and the emails were sent from this Laptop.

(i) Ronald Joseph (PW-8) in his evidence admitted that he arrived at Karachi on 4.2.2002; that he received the Laptop on 4.2.2002 in the US Consulate; that he was not aware of the name of the person who handed over to him the said Laptop but he was told that the Laptop is to be processed; that the Laptop was delivered to him from the locker-room of the US consulate; that he took six days in examining and processing the said Laptop. It is also a circumstance that when he left USA, he had knowledge that in Pakistan he was required to process the Laptop. According to his evidence he was briefed to process the Laptop/computer two days before he left for Pakistan, meaning thereby that he was aware on 28th or 29th January 2002 that while going to Pakistan he has to process a Laptop/computer because he left USA on 31.1.2002. Whereas according to prosecution's own case the second email was sent to Mrs. Daniel Pearl on 30.1.2002. It is also a circumstance that the emails were delivered by Mrs. Daniel Pearl on 5.2.2002 to the police and prior to that the FBI expert had received the recovered Laptop and started to examine it. The argument of learned counsel for the prosecution that Ronald Joseph (PW-8) may have been briefed regarding the Laptop of Mrs. Daniel Pearl or Mrs. Nomani, but surprisingly no such Computer from these ladies was ever recovered. The name of the sender of the said email to the computer of Mrs. Daniel Pearl or Mrs. Nomani could be traced out on which the said email have been received. So only one laptop was in the field which was allegedly recovered on

11.2.2002 from the residence of Fahad Nasim Ahmed whereas Ronald Joseph (PW-8) came to Pakistan on 4.2.2002 only to examine the said Laptop. So one thing is quite clear that the Laptop which was shown to be recovered on 11.2.2002 from the residence of Fahad Nasim Ahmed, was already available in the locker-room of US consulate on 4.2.2002. This fact by itself is indicative of the fact that all the recoveries were fabricated and planted to create an evidence against the accused persons which evidence was already available in the locker-room of US consulate. It is admitted by Ronald Joseph that he left Pakistan on 15.2.2002 and Laptop was shown to be recovered on 11.2.2002, as alleged by the prosecution, and given to the FBI on 12.2.2002 via Embassy. According to Ronald Joseph (PW-8) he completed the examination of the Laptop in six days, meaning thereby that he completed the examination of the alleged recovered Laptop on 18.2.2002, whereas according to his own version he left Pakistan on 15.2.2002. The learned counsels appearing on behalf of the prosecution are unable to explain as to recovery of the Laptop on 11.2.2002 was genuine or the evidence of Ronald Joseph (PW-8) and his expert report was truthful and genuine. If the prosecution's version regarding the recovery of Laptop on 11.2.2002 is believed then the examination of the laptop by the FBI expert on 4.2.2002 would not be possible. If we believe that FBI expert did examined the recovered Laptop, then there is no evidence from where, when and from whom this Laptop was recovered and under what circumstances. The whole prosecution story became doubtful so far recovery of Laptop and other recovered articles are concerned. So the recoveries alongwith Laptop and the expert report generated from the said Laptop are

clouded in the doubts and no reliance can be place on such recovery and expert report.

27. The other recoveries including manuscripts in English and Urdu regarding ransom demand which was allegedly recovered at the same time when Laptop was recovered, so there is no guarantee that such recoveries were also affected on the same night. The statement of Ronald Joseph exposed the padding, fabrication and illegal detention of accused persons and the recoveries from them. His evidence also falsified the statements of recovery witnesses and also the statement of Sheikh Naeem on whose pointation the arrest of Fahad Nasim Ahmed was shown to have been effected on 11.02.2002 and laptop etc. was recovered. So all the recoveries allegedly effected on the night of 10th/11th February 2002, became doubtful in view of the statements of Ronald Joseph. Likewise arrest of Ahmed Omar Sheikh on 13.02.2002 and the recoveries from him also negated from the fact that he was already in illegal confinement and this fact is also confirmed by the statement of John Molligan (PW-12).

28. In order to prove the manuscript allegedly written by Sheikh Muhammad Adil in Urdu and Ahmed Omar Sheikh in English, the prosecution produced Ghulam Akbar (PW-10), who claimed himself handwriting expert who gave a positive report that handwritten sample taken from Sheikh Muhammad Adil in Urdu and Ahmed Omar Sheikh in English have matched with the manuscript which was recovered from the residence of Fahad Nasim Ahmed on 11.2.2002 (already disbelieved in preceding para). Ghulam Akbar (PW-10) although claimed that he was handwriting expert but he admitted that "*I am post graduate in Sindhi Literature from Karachi*

University. In that course the process of comparison is not taught to me. I have obtained no degree in this connection. It is fact that there are persons who can write the same in similar hand writing." He also admitted during cross-examination that *"It is fact that in the opinion I had not mentioned the ground in support of my opinion, but I have brought which are in my file."* The above cross-examination clearly indicates that Ghulam Akbar (PW-10) had no qualification, knowledge or expertise to be regarded as a handwriting expert. A handwriting expert who has no requisite qualification and has not been designated as handwriting expert, has no value. PW-10 had no competency and ability to correctly match handwriting sample to the original sample from the same person. The most important aspect of the case is that he had not given any reason/ground or basis in his report as to how he has formed the said opinion and on which ground he came to the said conclusion. He had not mentioned identical letters, natural flow of words and formation of letter etc. The handwriting report does not mention the reasons and the points of similarity, hence the same is not worthy of reliance. So no reliance can be placed on such piece of evidence and expert report.

29. So far identification parade of Ahmed Omar Sheikh by Nasir Abbas (PW-1) and Asif Mehfooz Farooqui (PW-6) is concerned, we have observed that both the witnesses have not described his role during the identification parade and simply picked him up as an accused. Nasir Abbas (PW-1) had seen the accused after one hour of *Maghrab* prayer when darkness has prevailed. In that eventuality it was not possible to capture the features of the person properly. He even did not describe the feature of the person with whom the foreigner left in a Car. Admittedly the dummies with

which Ahmed Omar Sheikh was mixed up wearing different dresses, having different features and physics. Their names, ages and other particulars have not been mentioned by the learned Magistrate. Nasir Abbas (PW-1) admitted that only one person with beard was in the said queue. Nasir Abbas (PW-1) admitted that 20/25 Cameramen were present in the Court room. The Magistrate Iram Jehangir admitted that there was visible bullet mark on the right shoulder of the accused. So the accused with beard alone in the queue with a bullet mark could have been picked up easily by any person whose photographs had been published from 10th February onward in newspapers. The illegal confinement, as already discussed, also gave a presumption that during this period he was exposed to the witnesses. Same was the situation regarding identification of the same accused made by Asif Mehfooz Farooqui (PW-6). Both of them have not described the role of Ahmed Omar Sheikh. So the identification proceedings were full of irregularity, infirmity and cannot be taken into consideration especially when evidence of these two witnesses had already been discarded, as mentioned above.

30. Learned counsel for the parents of Denial Pearl had tried to highlight the previous involvement of Ahmed Omar Sheikh in a criminal case of such nature registered in India but we observe that during trial the FIR or other documents regarding the said case were never produced in the evidence nor ever the accused was confronted during the trial on this aspect of the case. Even otherwise while deciding a case the peculiar facts of the said case has to be seen.

31. Learned counsel had also made stress upon a letter written by Ahmed Omar Sheikh from jail during the pendency of his appeal in which, according to learned counsel, he had made confession that he was having a minor role in the occurrence but while going through the said letter we observe that the accused Ahmed Omar Sheikh had professed his innocence in many words in the said letter and ultimately he made a complaint that the sentence awarded to him was very harsh if the role attributed to him is seen. It is a circumstance that this letter was never agitated or argued before the High Court and there is no finding of High Court on this letter. The circumstance of the present case create serious doubt and in that eventuality no premium can be extended for such letter and same cannot be taken into consideration separately rather the whole letter has to be taken in toto in which again and again the accused professed his innocence.

32. After careful reappraisal of the entire evidence, as discussed above, we are entertaining no amount of doubt that prosecution has failed to bring home guilt of the accused/respondents and appellant as the evidence furnished during the trial is full of factual and legal defects. In this case, regarding each and every piece of evidence the doubts are emerging from the mouth of the witnesses, and it is settled since centuries that benefit of doubt automatically goes in favour of an accused. Even if a single circumstance create reasonable doubt in a prudent mind regarding guilt of an accused then the accused shall be entitled to such benefit not as a matter of grace and concession but as a matter of right and such benefit must be extended to the accused person(s) by the Courts without any reservation. Reliance can be made upon

the case of ***Muhammad Mansha vs. the State*** (2018 SCMR 772) in which this Court held as under :

> **"**Needless to mention that while giving the benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of such doubt, not as a matter of grace and concession, but as a matter of right. It is based on the maxim, "it is better that then guilty persons be acquitted rather than one innocent person be convicted". Reliance in this behalf can be made upon the cases of ***Tariq Pervez v. The State*** (1995 SCMR 1345), ***Ghulam Qadir and 2 others v. The State*** (2008 SCMR 1221), ***Muhammad Akram v. The State*** (2009 SCMR 230) and ***Muhammad Zaman v. The State*** (2014 SCMR 749).**"**

Reliance in this behalf can also be made upon the cases of ***Muhammad Imran vs. the State*** (2020 SCMR 857), ***Abdul Jabbar and another vs. the State*** (2019 SCMR 129), ***Mst. Asia Bibi vs. the State and others*** (PLD 2019 SC 64), ***Muhammad Ashraf alias Acchu vs. the State*** (2019 SCMR 652), ***Gul Dast Khan vs. the State*** (2009 SCMR 431) and ***Daniel Body (Muslim name Saifullah) and another vs. the State*** (1992 SCMR 196).

(i) The High Court had rightly extended the benefit of doubt to Fahad Nasim Ahmed, Syed Salman Saqib and Sheikh Muhammad Adil and acquitted them from all the charges and had also rightly extended the benefit of doubt to Ahmed Omar Sheikh qua all other charges. However, the High Court ignored these important points mentioned above and wrongly convicted him under section 362 PPC when, as discussed above, the evidence of Nasir Abbas (PW-1) was full of doubts and no reliance can be placed on such doubtful statement. So the conviction of Ahmed Omer Sheikh under section 362 PPC was not justified. Although, learned counsel for the parents of Daniel Pearl argued that it is a high-profile case but

even in such like cases the benefit of doubt cannot be extended to the prosecution and it is settled since centuries that such benefit can only be extended to the accused who is facing the trial. The trial Court although had convicted the accused persons under section 365-A, 302, 120-A PPC read with section 6(a) of ATA but surprisingly sentenced them only under section 7(a) of ATA and no sentence was passed independently for each offence rather single sentence in the shape of death to Ahmed Omar Sheikh and life imprisonment in respect of remaining three accused was passed and this illegality was also not curable. Even no conviction can be passed under section 120-A PPC, which deals with the definition of criminal conspiracy. Even conviction and sentence under section 362 PPC awarded by the High Court is illegal as no sentence under section 362 PPC is provided, so conviction or sentence passed by the High Court under section 362 PPC was also illegal.

33. Admittedly the parameters to deal with the appeal against conviction and appeal against acquittal are totally different because the acquittal carries double presumption of innocence and same could be reversed only when found blatantly perverse, illegal, arbitrary, capricious or speculative, shocking or rests upon impossibility. If there is a possibility of a contrary view even then acquittal could not be set aside as has been settled in the cases of ***The State vs. Khuda Dad and others*** (2004 SCMR 425). ***Muhammad Nazir vs. Muhammad Ali and another*** (1986 SCMR 1441), ***Rehmatullah Khan vs. Jamil Khan and another*** (1986 SCMR 941), ***Mst. Daulan vs. Rab Nawaz and another*** (1987 SCMR 497) and ***Gulzar Hussain vs. Muhammad Dilawar and others*** (1988 SCMR 847)

33. As already discussed, the whole prosecution evidence is full of doubts and the prosecution has failed to prove the guilt of the accused persons. Hence Criminal Appeal No.602/2020 filed by Ahmed Omar Sheikh is allowed. He is acquitted of all the charges. He shall be released from jail if not required to be detained in any other case. Criminal Appeals No.599 to 601 of 2020 filed by the State against acquittal and Criminal Petitions No.1085 and 1086 of 2020 filed by the parents of Daniel Pearl against the acquittal of Fahad Nasim Ahmed, Syed Salman Saqib and Sheikh Muhammad Adil and for enhancement of sentence of Ahmed Omar Sheikh are dismissed. The above noted are the reasons of our short order passed on 28.1.2021, by a majority of two against one, (Yahya Afridi, J. dissenting) which is reproduced as under :

> **"Mushir Alam, J.-** For the reasons to be recorded later, by a majority of 2 to 1 (Yahya Afridi, J. dissenting), Criminal Appeals No.599, 600 & 601 of 2020, Criminal Petitions No.1085 and 1086 of 2020 are dismissed, the impugned judgment dated 02.04.2020 passed by the High Court of Sindh, Karachi is maintained to the extent of acquittal of all the four respondents from their charges. Criminal Appeal No.602 of 2020 filed by Ahmed Omer Sheikh against his conviction under section 362 PPC, is allowed and he is acquitted of the charge by extending the benefit of doubt to him. Ahmed Omer Sheikh, Fahad Nasim Ahmed, Syed Salman Saqib and Sheikh Muhammad Adil shall be released from the jail forthwith if not required to be detained in connection with any other case. All the miscellaneous applications filed by the either party have lost their relevance, hence, disposed of as such.
>
> Sd/-
> Sd/-
>
> **Yahya Afridi, J.-** For the reasons to be recorded later, Criminal Appeals No.599, 600 and 601 of 2020 and Criminal Petitions No.1085 & 1086 of 2020 are partly allowed in the terms that Ahmed Omer Sheikh and Fahad Nasim are convicted under sections 365-A & 120-B, PPC and section 7 of the Anti-Terrorism Act, 1997 each and sentenced to imprisonment for life on each count. All the sentences passed against both the convicts shall run concurrently. The benefit under section 382-B, Cr.P.C. shall be extended to them. To the extent of Syed Salman Saqib and

Sheikh Muhammad Adil Criminal Appeals No.599, 600 & 601 of 2020 and Criminal Petitions No.1085 & 1086 of 2020 are dismissed and their acquittal is maintained on all the charges, they shall be released from the jail forthwith if not required to be detained in connection with any other case. Criminal Appeal No.602 of 2020 filed by Ahmed Omer Sheikh is dismissed."

Sd/-"

Judge

Judge

Judge

ORDER OF THE COURT

By a majority of two against one, Criminal Appeals No.599, 600 and 601 of 2020, Criminal Petitions No.1085 and 1086 of 2020 are dismissed. Criminal Appeal No.602 of 2020, is allowed in the terms noted in the opinion recorded by Sardar Tariq Masood, J, which opinion is declared to be the judgment of the Court.

Judge

Judge

Judge

Islamabad, the

*M Saeed/***

NOT APPROVED FOR REPORTING.

Judge

YAHYA AFRIDI, J — What we have before us are four criminal appeals, with the leave of the Court, and two direct criminal petitions, all challenging the judgment dated 02.04.2020 passed by the High Court of Sindh, Karachi in appeals filed by the four accused-convicts and the State against the judgment of the Anti-Terrorism Court No. II, Hyderabad dated 15.07.2002 in Police Crime No. 24 of 2002 of Artillery Maidan Police Station, Karachi (South).

Appeals and petitions

2. All contesting parties in the cases in hand are aggrieved of the impugned judgment of the High Court of Sindh. The State has impugned in appeal before this Court, the acquittal of the three accused, namely, Fahad Naseem, Salman Saqib and Sheikh Muhammad Adil and the reduction in sentence of Ahmed Omar Sheikh **(Criminal Appeals No.599-601/2020).** Then we have the appeal moved by Ahmed Omar Sheikh, who is aggrieved of the conviction and sentence passed against him **(Criminal Appeal No.602/2020)**. Lastly, we have the two direct petitions filed by the parents of Daniel Pearl, challenging the acquittal of the three acquitted accused, Fahad Naseem, Salman Saqib and Sheikh Muhammad Adil, and the reduction in the sentence of the fourth accused, Ahmed Omar Sheikh **(Criminal Petition No.1085/2020 and Criminal Petition No.1086/2020)**.

Chronology of events

3. In a nutshell, the prosecution story of how the events unfolded, can be summarized as under: -

i. On 08.01.2002, Daniel Pearl, South Asia Bureau Chief of the Wall Street Journal on an assignment in Pakistan, contacted Asif Mehfooz Farooqui (PW-6), a journalist working for a Japanese news agency, to arrange a meeting with Pir Mubarik Shah Gilani, who was said to be the spiritual guide of Richard Read known as the "shoe bomber". Asif Mehfooz Farooqui (PW-6) contacted Arif *alias* Hashim (absconding accused No. 3) who arranged a meeting with the contact of Pir Mubarik Shah Gilani on 11.02.2002 at Akbar International Hotel, Rawalpindi. In this meeting Bashir (later identified as Ahmed Omar Sheikh) was introduced to Daniel Pearl as a contact ('*Mureed*') of Pir Mubarik Shah Gilani.

ii. A week later, Daniel Pearl informed Asif Mehfooz Farooqui (PW-6) that "Bashir" had arranged a meeting with Pir Mubarik Shah Gilani at Karachi.

iii. Accused Fahad Naseem and Salman Saqib received Ahmed Omar Sheikh from Jinnah International Airport at Karachi and took him to a house in KDA, where they discussed the modalities of sending emails to various organizations and agreed to purchase polaroid cameras, a scanner and a printer. Later, Ahmed Omar Sheikh handed them, scripts in English and Urdu, which they agreed to email.

iv. On 23.01.2002, a 'white man' hired a taxi driven by Nasir Abbas (PW-1), who was dropped around 07.00 P.M. outside Village Restaurant, Metropole Hotel, Karachi, where he met a person (later identified as Ahmed Omar Sheikh) with whom he sat with and drove off in a white Toyota corolla car.

v. Emails dated 27.01.2002 and 30.01.2002 were received by different persons, including media outlets: containing information regarding Daniel Pearl's abduction, the demand for ransom for his release, and death consequences for its non-compliance.

vi. On 04.02.2002, Marianne Pearl, wife of Daniel Pearl, made a written complaint to the S.H.O. Artillery Maidan Police Station, Karachi (South) reporting the suspicious absence of her husband.

vii. In furtherance of the said complaint, the case FIR No. 24 of 2002, was registered under sections 365-A, Pakistan Penal Code, 1860 **("PPC")** read with section 7 of the Anti-Terrorism Act, 1997 **("FIR").** Sections 368 /302 /109 /205/120-A/34, PPC read with sections 7-A, 8(a)(b)(c), 11/A(a)(b)(c), 6(2)(b)(c)(e)(f), 11/H(3-4), 11/V(I)(a)(b)(2), 11/L(a)(b), 7(a)(b)(2), 11/H(2)(a)(b), 11/W(1)(2), 7 of the Anti-Terrorism Act, 1997 **("ATA")** were subsequently added to the FIR.

viii. Accused Fahad Naseem, Salman Saqib and Sheikh Mohammad Adil were stated to be arrested from Karachi on 11.02.2002. While accused Ahmed Omar Sheikh was stated to be arrested from a public place close to Jinnah International Airport, Karachi on 13.02.2002.

ix. Ahmed Omar Sheikh, on 14.02.2002 at the time of his first remand before Arshad Noor Khan, Judge, Anti-Terrorism Court-III, Karachi, has been stated to have admitted that he abducted Daniel Pearl, who was by then dead.

x. Nasir Abbas (PW-1) and Asif Mehfooz Farooqui (PW-6) identified Ahmed Omar Sheikh in two separate Test Identification Parades carried out by Irum Jahangir (PW-9), Judicial Magistrate, on 21.02.2002 and 01.03.2002, respectively.

xi. Irum Jahangir (PW-9), Judicial Magistrate, recorded the confessional statements of the accused Fahad Naseem and Salman Saqib on 21.02.2002 and 01.03.2002, respectively.

xii. John Mulligan (PW-12) received a video cassette from a source on 21.02.2002, and the same was viewed in

Court, showing the murder scene, which the prosecution claims to be that of Daniel Pearl.

xiii. On 28.03.2002, the Challan was submitted before the Anti-Terrorism Court **("ATC")** against eleven persons, seven of them were declared absconders under the relevant provisions of Cr.P.C.

The Trial

4. The Anti-Terrorism Court No.III, Karachi framed the charge against all four arrested accused, namely; Fahad Naseem, Syed Salman Saqib, Sheikh Muhammad Adil and Ahmed Omar Sheikh, for the offences under sections 120-A, 365-A, 302, PPC read with section 6(a) of the ATA. All four accused pleaded not guilty and claimed trial. The High Court of Sindh on an application of the State *vide* order dated 30.04.2002 directed for the transfer of the trial from ATC Karachi to ATC Hyderabad. Accordingly, trial proceedings were transferred from ATC Karachi to ATC Hyderabad, and for security reasons, the same were carried out at Central Jail, Hyderabad.

5. The prosecution produced twenty-three witnesses to prove their case against the accused persons. After closing of prosecution evidence, all four accused persons recorded their statements under section 342, Cr.P.C. None of the accused wanted to record his statement on oath under section 340(2), Cr.P.C. However, Ahmed Omar Sheikh produced two witnesses in his defence: his uncle, Rauf Ahmed Sheikh, District & Sessions Judge (DW-1), and his father, Saeed Ahmed Sheikh (DW-2).

6. The trial Judge, ATC No.II Hyderabad vide judgment dated 15.07.2002 held that the prosecution had proved the guilt of all

four accused beyond reasonable doubt and convicted the accused persons, as guilty of offences under sections 120-A, PPC 365-A, 302, PPC read with section 6(a) of the Anti-Terrorism Act, 1997. And sentenced them in terms that;

> "Ahmed Umer Shaikh it appears that this accused had engineered entire plan of creating sense of fear nationally and internationally and thereby made conspiracy and he was a Principal Offender and he made with his efforts the other remaining accused to be his aiders/associates for the purpose of completion of his above plan involving the sense of fear, insecurity nationally and internationally. I, therefore, convict accused persons under section 365-A, 302, PPC read with section 6(a) of the Anti-Terrorism Act, 1997 and Section 120-A, PPC and thereupon as a result accused Ahmed Umer Saeed Shaikh is sentenced to death under section 7 of the Anti Terrorism Act, 1997 to be hanged by the neck till he is dead.
>
> "Adil Shaikh, Salman Saqib and Fahad Naseem are sentenced under section 7 of the Anti-Terrorism Act, 1997 to suffer Life Imprisonment. They are also sentenced to pay fine of Rs. 5,00,000/- each. In case of non payment of fine, these accused persons shall undergo sentence for five (5) years more.
>
> "This court also direct all the four accused persons to pay jointly a sum of Rs. 20,00,000/- (Twenty Lacs), which shall be paid by them in equal share and if this amount is paid it shall be given to the widow of Daniel Pearl and also to his Orphan son. The imprisonment sentences shall to run concurrently and benefit under section 382-B, Cr.P.C. is given to the accused person. The death sentence awarded will be executed subject to the confirmation by the Hon'ble High Court of Sindh, for which the reference is separately made to the Hon'ble High Court of Sindh."

Appeal and Judgment of the High Court of Sindh

7. All four convicted accused assailed the trial court judgment recording their convictions and sentences in appeal before the High Court of Sindh, Karachi. The High Court did not concur with the findings of the trial court on crucial issues for the following reasons:

> (i) On the charge of criminal conspiracy against the accused, the appellate court found that the same was not proved, as there was no evidence of Fahad Naseem, Syed Salman Saqib, and Sheikh Muhammad Adil being present with Ahmed Omar Sheikh in room No. 411 of Akbar International Hotel, Rawalpindi on 11.01.2002. The lack of evidence to show

their physical presence together at the relevant time and place was found crucial by the High Court to render a finding that the said charge of conspiracy was not proved against all the four accused.

(ii) On the charge of abduction, the appellate court found Ahmed Omar Sheikh guilty of having committed the offence of abduction under section 362, PPC, based on the reasons that: the delay in submitting the complaint to the police by Marianne Pearl was not unnatural, as she was not only a foreigner, but was also expecting a child; Asif Mehfooz Farooqui (PW-6) and Amir Afzal (PW7) were independent and not chance witnesses, and their evidence legally sufficed to prove the deceitful means by which Ahmed Omar Sheikh managed to set up a plan for a meeting between Daniel Pearl and Pir Mubarak Shah Gilani at Karachi; that Asif Mehfooz Farooqui (PW-6) identified Ahmed Omar Sheikh as Bashir in the test identification parade which despite some irregularities, was found to be of legal weight; the testimony of Amir Afzal (PW-7) and the hotel receipts (**Exh.P/10/1** and **Exh.P/10/4**), which he produced corroborated the testimony of Asif Mehfooz Farooqui (PW-6); Nasir Abbas (PW-1) was also found to be an independent witness, and his testimony regarding Daniel Pearl being "last seen" with Ahmed Omar Sheikh on 23.01.2002, and his identifying Ahmed Omar Sheikh in the test identification parade was found worthy of legal credence; the testimony of Jameel Yousaf (PW-2) was found to corroborate the testimony of Nasir Abbas (PW-1).

(iii) On the charge of abduction for ransom, the appellate court found that the prosecution evidence did not prove the fact that the demand of ransom was made by the accused. In so concluding, the appellate court passed crucial findings of facts that: the prosecution evidence regarding the time and place of arrest of the accused was not legally proved and was contrary to other prosecution evidence; the recoveries made from the accused at the time of their arrests were not legally reliable; the Forensic Reports based on the data from the

recovered laptop rendered by Ronald Joseph (PW-8) could not be legally relied upon, as there was a possibility that the laptop was manipulated by the investigating agency and later was shown to have been recovered from Fahad Naseem at the time of his arrest; the testimony of Shaikh Naeem (PW-14) was found lacking to prove that the ransom emails of 27.01.2002 and 30.01.2002 were sent by Fahad Naseem; the prosecution evidence to prove that the polaroid camera was purchased by Fahad Naseem and Salman Saqib from Mohammad Arif (PW-16) was nullified, when the same were not produced in evidence; the confessions of Fahad Naseem and Salman Saqib were inadmissible, lacking the essential ingredients of being voluntary as required under Article 37 of the Qanun-e-Shahadat, 1984; the stance of the prosecution that, Ahmed Omar Sheikh made an admission before the Judicial Magistrate granting his police remand on 14.02.2002 were not accepted as the same was neither recorded in the remand order nor was the Judicial Magistrate granting the remand order produced as a witness by the prosecution to prove the said fact; Ghulam Akbar Jaffari (PW-10) lacked the technical expertise to be worthy of rendering any opinion as a handwriting expert.

(iv) On the charge of murder, the appellate court held that the prosecution had failed to produce any evidence to prove the guilt of the accused, and it held that: the death of Daniel Pearl was not in close proximity to the date of his being "last seen" with Ahmed Omar Sheikh; the video cassette produced by John Mulligan (PW-12) showing the murder of Daniel Pearl did not show that the execution was being carried out by all or any one of the four accused; no crime weapon was recovered to link the same to the accused.

8. Based on the above findings, the High Court allowed the appeals filed by Fahad Naseem, Syed Salman Saqib, Sheikh Muhammad Adil and they were acquitted of all charges; while the appeal of Ahmed Omar Sheikh was partially allowed, and he was

acquitted of all framed charges, and convicted for the offence under section 362, PPC and sentenced to seven years R.I. and a fine of Rs. 2,000,000/-.

Maintainability of the petition filed by the parents of Daniel Pearl

9. Before adverting to the legal merits of the controversy involved in the cases in hand, it would be pertinent to address the maintainability of the direct criminal petitions filed before this Court by the parents of Daniel Pearl against the acquittal of the three accused and reduction in sentence of fourth accused by the High Court. When confronted with the above challenge, the learned counsel representing the parents of Daniel Pearl contended that the scope of Article 185(3) of the Constitution of Islamic Republic of Pakistan, 1973 ("**Constitution**") was wide enough to entertain petitions filed by *"person aggrieved"*, which included the parents of the person wronged. In this regard, the learned counsel sought reliance on **Muhammad Shafi v. Muhammad Asghar.**[1] In this judgement, the Court held that the paramount consideration for the exercise of jurisdiction, in terms of Article 185(3) of the Constitution, has been to foster the dictates of justice, and not to look at the person invoking the jurisdiction of Supreme Court. The jurisdictional contours of the Supreme Court for entertaining criminal petitions under Article 185 of the Constitution can be flexed for bolstering the ends of justice.

10. In the given circumstance, it is difficult to hold that the parents of Daniel Pearl are not the "persons aggrieved", within the contemplation of Article 185 of the Constitution. Accordingly, the

[1] Muhammad Shafi v. Muhammad Asghar (PLD 2004 SC 875).

present Criminal Petition No. 1085/2020 and Criminal Petition No. 1086/2020 are held to be maintainable.

Remand for additional evidence – Post-Mortem Examination Report

11. The learned counsel representing the parents of Daniel Pearl prayed for the remand of the case to the appellate court for recording of additional evidence in terms of section 428, Code of Criminal Procedure, 1898 **(Cr.P.C.)** to prove that the Post-Mortem Examination Report available on the record of the Trial Court was, in fact, that of Daniel Pearl. It was urged that proving this fact was necessary for the just adjudication of the case and submitted further that the DNA report of the deceased confirmed that the dead body so recovered and examined, was of Daniel Pearl, who, he further asserted, now remains buried in Los Angeles, United States of America.

12. This issue of the Post-Mortem Examination Report arose when a report published in Daily *"Umat"* dated 28.05.2002 stated that the dead body of Daniel Pearl had been recovered and examined by a Medical Board of doctors. Based on the said report, Ahmed Omar Sheikh, moved an application to the trial court seeking the said Post Mortem Report to be placed on record of the case. This application was opposed by the State. However, the trial court *vide* order dated 28.05.2002 allowed the Post Mortem Examination Report to be placed on the record of the case. The contents of the Report stated that a Special Medical Board comprising of six doctors was constituted to examine a corpse, and after examination, the report *inter alia* noted; that the exhumation was carried on at 09.00 A.M. on 17.05.2002, while the post-

mortem examination of the corpse was carried out on the same day; the place of exhumation was a plot in Ahsanabad, Karachi; the name and parentage of the dead person was clearly marked as "*unknown*" and "*the body is partially decomposed and adipocered. Facial features are not identifiable due to decomposition changes in all soft tissues*".

13. It is by now a settled principle of criminal administration of law that the appellate courts are to be cautious in allowing the production of additional evidence at an appellate stage, especially when such fact was available and in the knowledge of the party seeking to produce it, as additional evidence.[2] The underlying reason for the Appellate Court to exercise restrain is that it might prejudice the case of the accused[3] or be used to fill the lacunas of the prosecution case.[4] Therefore, unless the said evidence could not have been collected earlier, despite due diligence or where the said party was prevented from collecting and producing the same at the trial for reasons beyond its control and power, the appellate courts are not to allow production of such additional evidence.[5]

14. Given the above principles governing the production of additional evidence, request of the parents of Daniel Pearl for the production of additional evidence does not merit legal consideration. It is noted that the Post Mortem Examination Report sought to be produced in evidence and proved by adducing additional evidence was available before the Trial Court, and no

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[2] Dildar v. The State through Pakistan Narcotics Control Board, Quetta (PLD 2001 SC 384), Fazal Ellahi and others v. Crown (PLD 1952 Lahore 388) and Nasir Khan and others v. The State (2005 P.Cr.L.J.1)

[3] Ali v. Crown (PLD 1952 FC 71); Ghulam Muhammad v. State (PLD 1957 Lah. 263); Muhammad Ismail v. State (PLD 1970 Kar. 261); Muhammad Ehsan v. State (PLD 1975 Lah. 1431); Gullan v. State (PLD 1977 Lah. 1103); Barkat Ali v. Crown (1969 SCMR 448)

4 Ibid No.2 and 3.

5 Dildar vs. The State (PLD 2001 SC 384)

positive step was taken by the petitioners during the trial or appellate stage. Hence, the belated request of the parents of Daniel Pearl for the production of additional evidence being bereft of legal merit is denied.

Letter of Ahmed Omar Sheikh

15. The learned counsel for the parents of Daniel Pearl also urged, as an additional ground, for remand of the case to the appellate court to consider the letter dated 25.07.2019, stated to be written and signed by Ahmed Omar Sheikh from the Hyderabad Central Jail addressed to the High Court of Sindh, which allegedly contained his admission of criminal culpability. According to the learned counsel, the High Court failed to consider the said letter while deciding the appeals. The learned counsel for Ahmed Omar Sheikh raised serious objections to the consideration of the said letter. The learned counsel was directed to obtain instructions from accused Ahmed Omar Sheikh. Upon receipt of the instructions, it was stated that Ahmed Omar Sheikh admitted to writing the letter but denied having any part in the commission of the offence. It was stated that the letter was meant only to attract the attention of the High Court for the early hearing of his appeal, which at the time had been pending for the last two decades.

Suffice it to state that the letter dated 25.07.2019 does not find any mention in the record of judicial proceedings before the High Court. In fact, there are well defined rules under the enabling provisions of the Qanun-e-Shahadat, 1984 for the admissibility of evidence and the recording of statement of the accused, which do not allow consideration of material, such as the letter of

25.07.2019. In fact, subject to law, none can be allowed to pitch a document before the Supreme Court for consideration, which was never formally tendered or produced in evidence and proved at the appropriate stage.[6] Allowing such a practice will not only undermine the sanctity of the judicial record and judicial proceedings, but also violate the rule of admissibility of evidence. Hence, the request of the parents of Daniel Pearl for considering the letter of 25.07.2019 is denied.

Production of Press Reports

16. The parents of Daniel Pearl through **Crl.M.A. No. 1744/2020** and **Crl.M.A. No. 18/2021** prayed to place on record certain newspaper reports; the first application related to Ahmed Omar Sheikh's alleged admission during the remand proceedings, and the second was regarding his activities during his incarceration in Central Jail Hyderabad. Our courts have generally, allowed relevant and uncontradicted news items published in newspapers or magazines regarding contemporaneous events to be admissible, to form the basis for drawing inferences and accepting as material for forming an opinion. In **Islamic Republic of Pakistan vs. Abdul Wali Khan**[7], newspaper articles that provided a contemporaneous account were held to be admissible, in the terms that:

> "[I]t cannot be denied that so far as newspaper reports of contemporaneous events are concerned, they may be admissible. Particularly where they happen to be events of local interest or of such a public nature as would be generally known throughout the community and testimony of an eye-witness is not readily available. The contemporary newspaper account may well be admitted in evidence in such circumstances as has often been done by Courts in the United States of America not because they are `business records' or 'ancient documents' but because they may well be treated as a trustworthy contemporaneous account of

[6] Khan Muhammad Yusuf Khan Khattak v. S. M. Ayub and 2 others (PLD 1973 SC 160), Province of the Punjab though Collector, Sheikhpura vs. Syed Ghazanfar Ali Shah [2017 SCMR 172]
7 Islamic Republic of Pakistan vs. Abdul Wali Khan (PLD 1976 SC 57)

> events or happenings which took place a long time ago or in a foreign country which cannot easily be proved by direct ocular oral testimony."

17. The above view has resounded in the judicial pronouncements that have followed.[8] However, in criminal cases such evidence must be viewed with strict caution. In **Muhammad Ashraf Khan Tareen v The State**[9], the appellant wanted the Court to rely on a newspaper reporting of the incident. The Court refused to accept the newspaper report as proof of the fact in issue, essentially on the ground that the author of the said report was not produced in Court to prove the fact he had so reported therein. Similarly, in the present case, the author of the reports urged to be considered, were not produced as witnesses, therefore, the said reports did not suffice as proof of the facts stated therein. Thus, admitting such newspaper reports as prayed for by the parents of Daniel Pearl, would be against the safe administration of criminal justice. Hence, the request is declined.

Production of acquittal order of Hashim *alias* Arif

18. On the other hand, the learned counsel for the accused Ahmed Omar Sheikh, through **Crl. M.A No. 2074/2020** in **Criminal. Appeal No. 599/2020** prayed that the Copy of the judgement of Anti-Terrorism Court dated 23.10.2014 Hyderabad in ATC Case No. 1 of 2008 "State Vs. Muhammad Hashim *alias* Arif" in FIR No. 24 of 2002 to be allowed to be placed on record. The learned defence counsel submitted that the accused Hashim *alias* Arif, who was declared a proclaimed offender in the instant case was

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8 Muhammad Nawaz Sharif's case (PLD 1993 SC 473); Mrs. Mamoona Saeed vs. Government of the Punjab (2003 YLR 2379)

9 Muhammad Ashraf Khan Tareen vs. The State (1996 SCMR 1747); Ishtiaq Ahmed Mirza vs. Federation of Pakistan (2019 PLD 675)

subsequently arrested, tried and acquitted by ATC Hyderabad. The learned Counsel argued that since the co-accused has already been acquitted, the present accused Ahmed Omar Sheikh cannot be held guilty of the offence of criminal conspiracy.

19. It is a fundamental principle of criminal jurisprudence that evidence of one case cannot be read into another case, and each case is to be decided in the light of evidence, so produced in that case alone.[10] Therefore, the said ATC judgement of acquittal cannot be considered, as an additional piece of evidence by either party (prosecution or defence) in the present case. Even otherwise, the said judgement would be of no legal avail to the defence, as the same clearly states that the prosecution witness, namely, Asif Mehfooz Farooqui (PW-6) during his cross-examination did not recognise the person being tried, as Arif *alias* Hashim, whom he had met with Daniel Pearl on 11.01.2002 in Akbar International Hotel Rawalpindi.

20. Now to the valued opinion of my respected brothers on the merits of the case. With all deference, I am unable to agree with their evaluation of prosecution evidence, the reasoning leading to, and their conclusion thereon. I, therefore, would most humbly offer my own reasons of dissent.

Charge of Criminal Conspiracy

21. The charge of criminal conspiracy is easy to allege and difficult to prove. However, it is one of the very serious offences, and it cannot be lightly adjudicated upon. Therefore, before adverting to the prosecution evidence, it would be appropriate to

10 Khushi Muhammad alias Natho v. The State (PLD 1986 SC 146), Akbar Ali v. Qazi Javed Ahmad and others (1986 SCMR 2018), Ali Sher v. The State (PLD 1987 Kar. 507) and Malik Aman v. Haji Muhammad Tufail (PLD 1976 Lah. 1446)

elaborate the substantive, procedural and adjective law relating to the offence.

22. "Conspiracy" derives from the Latin words "con" and "spirare", meaning "to breathe together".[11] In **Halsbury's Laws of England**, the English Law as to conspiracy consists of:

> "[an] agreement of two or more persons to do an unlawful act, or to do a lawful act by unlawful means. It is an indictable offence at common law, the punishment for which is imprisonment or fine or both in the discretion of the Court".[12]

A similar definition of conspiracy is provided in **Black's Law Dictionary** as:

> "An agreement by two or more persons to commit an unlawful act, coupled with an intent to achieve the agreement's objective, and (in most states) action or conduct that furthers the agreement; a combination for an unlawful purpose. Conspiracy is a separate offense from the crime that is the object of the conspiracy. A conspiracy ends when the unlawful act has been committed or (in some states) when the agreement has been abandoned. A conspiracy does not automatically end if the conspiracy's object is defeated." [13]

Therefore, the word "conspiracy" in its ordinary dictionary meaning has been described as: "an agreement by two or more persons to commit an unlawful act, coupled with an intent to achieve the agreement's objective, and action or conduct that furthers the agreement; a combination for an unlawful purpose;[14] to plot or scheme together: to devise: to act together to one end.[15]

23. In **American Jurisprudence**, the concept of "criminal conspiracy" is not different, as being defined in the terms:

> "an agreement between two or more persons to accomplish together a criminal or unlawful act or to achieve by criminal or unlawful means.....[T]he unlawful agreement and not its accomplishment is the jist or the essence of the crime of conspiracy".[16]

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11 Ibid No.4.
12 Halsbury's Laws of England (*vide* 4th Ed. Vol. 11, pages 44, 58).
13 Black's Law Dictionary, 9th edn.
14 Ibid.
15 Chambers English Dictionary.
16 American Jurisprudence (2nd Edition, Volume-16, page-129).

24. The **English Law** on this matter is well settled, as **Russell on Crime** notes:

> "The gist of the offence of conspiracy then lies, not in doing the act, or effecting the purpose for which the conspiracy is formed, nor in attempting to do them, nor in inciting others to do them, but in the forming of the scheme or agreement between the parties, agreement is essential. Mere knowledge, or even discussion, of the plan is not, per se enough."[17]

25. According to **Dr. Sri Hari Singh Gour's "Commentary on Penal Law of India"**, the legal position is summed up in the following words:

> "In order to constitute a single general conspiracy, there must be a common design. Each conspirator plays his separate part in one integrated and united effort to achieve the common purpose. Each one is aware that he has a part to play in a general conspiracy though he may not know all its secrets or the means by which the common purpose is to be accomplished. The evil scheme may be promoted by a few, some may drop out and some may join at a later stage, but the conspiracy continues until it is broken up. The conspiracy may develop in successive stages. There may be general plan to accomplish the common design by such means as may from time to time be found expedient."[18]

26. In our jurisdiction, the offence of criminal conspiracy has been defined in section 120-A, PPC and its punishment is provided under Section 120-B, PPC. There are also special rules of evidence regarding this offence embodied in Article 23 of the Qanun-e-Shahadat, 1984. For ease of reference, the aforementioned provisions are reproduced, hereunder:

> **"120-A. Definition of Criminal Conspiracy-**
> When two or more persons agree to do, or cause to be done —
> (1) an illegal act, or
> (2) an act which is not illegal by illegal means,
> such an agreement is designated a criminal conspiracy:
> Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.
>
> *Explanation.*- It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object."
>
> **"120- B Punishment of criminal conspiracy:**
> (1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards, shall, where no

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17 Russell on Crime notes: (12 Ed. Vol. I, p. 202)
18 Dr. Sri Hari Singh Gour, 'Commentary on Penal Law of India', (Vol. 2, 11th Edn. page 1138)

> express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence.
> (2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment of either description for a term not exceeding six months, or with fine or with both."
>
> **Article 23, Qanun-e-Shahadat, 1984**
> "Things said or done by conspirator in reference to common design:
> Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy, as for the purpose of showing that any such person was a party to it."

27. Given the above statutory provisions, it can be noted that to constitute criminal conspiracy under section 120-A, PPC two essential elements are required to be proved: (i) intent to do or cause to be done an illegal act, or an act which is not illegal but by illegal means; (ii) existence of a conspiratorial agreement. Realising the clandestine nature of the offence, the legislature has employed a special rule of evidence, as provided under Article 23 of the Qanun-e-Shahadat, 1984. The said rule is an exception to the general rules of proof. This rule provides that there should be 'reasonable ground' that a person was a party to the conspiracy before his acts, statements or writings can be used against his co-conspirators. Mere association of a person with a conspirator or even a serious suspicion of one's involvement with the other is not sufficient to constitute 'reasonable ground' for the former to be in conspiracy with the latter. Similarly, it is not necessary to establish by direct evidence that the accused and the person whose acts, statements or writings are sought to be given in evidence against the accused, entered into a formal agreement to commit an offence.

In cases of conspiracy, direct evidence is seldom available and a conspiracy can be established by circumstantial evidence. On this subject, it is difficult to establish a general inflexible rule, as each case must be adjudged by its own peculiar circumstances. Therefore, strict proof of conspiracy is not necessary; what is required by Article 23 of the Qanun-e-Shahadat, 1984, is that there should be "reasonable grounds" to believe that the accused and the person whose acts, statements or writings are sought to be given in evidence have conspired to commit an offence or an actionable wrong.[19] Where once the prosecution proves the existence of 'reasonable grounds' that two or more have committed an offence or an actionable wrong, anything said done or written by one of the conspirators in reference to the common intention, after the said intention was entertained, is relevant against the others, not only for the purpose of proving the existence of the conspiracy but also for proving that the other person was a party to it.

There appears to be a judicial consensus in common law jurisdiction that: -

I. The essential ingredients for constituting criminal conspiracy are; an agreement between two or more persons and the agreement must relate to doing or causing to be done either an illegal act or an act which is not illegal in itself but is done by illegal means. Mere common intention or discussion would not constitute the offence unless, there is an agreement.

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19 Bhagwan Swarup Lal Bishan Lal and others v The State of Maharashtra (AIR 1965 SC 682)

II. In most of the cases, criminal conspiracy is hatched in secrecy and no direct evidence could be obtained. Therefore, the circumstances and manner in which each accused plays his role and his level of involvement would be the relevant factors. The circumstances indicating the guilt of the accused would be cumulatively considered in view of the common design and object. The isolated approach, by evaluating the role of individual accused, cannot be adopted. However, the acts or conduct of the parties must be conscious and clear enough to infer their concurrence as to the common design and its execution.

III. Each one of the accused is aware that he has a part to play in a conspiracy though he may not know all the details or the means by which the common purpose is to be accomplished.

IV. The conspiratorial scheme may be promoted by a few, some may drop out and some may join at a later stage, but the conspiracy continues until it is broken up.

V. The offence of criminal conspiracy is an exception to the general principle of criminal law requiring both, *mens rea* and *actus reus*. The offence of criminal conspiracy does not require any *actus reus,* and stands completed when the conspiratorial agreement is made.

VI. Criminal conspiracy is an “independent offence”, and the means adopted by the conspirators may lead to commission of independent offences, for which they would be criminally liable in addition to the offence of criminal conspiracy. The marked yet subtle distinction between the offence of ‘criminal conspiracy’ and that of ‘abetment’ has always remained a touchy issue. Any person, who is not privy to the conspiratorial agreement but aids and abets any person in achieving the unlawful

goal of the criminal conspiracy would be committing abetment of the substantive offence, so committed in achieving the unlawful goal. In such cases, the person abetting would be charged for abetment of the substantive offences committed in achieving the ultimate unlawful goal and not for criminal conspiracy.

VII. Criminal conspiracy is a 'continuing offence'. The offence continues till the illegal object is achieved or when the same is abandoned by the conspirators.

28. In the present case, the content and evidential value of the prosecution evidence to prove criminal conspiracy against the accused, would have to be viewed and evaluated in accordance with the principles enumerated, hereinabove. This would take us to first consider, Asif Mehfooz Farooqui (PW-6), who introduced himself as a journalist working for a Japanese news agency, and deposed that on 08.01.2002, he was contacted by Daniel Pearl through a mutual contact, seeking to arrange a meeting with Pir Mubarik Shah Gilani, who was said to be the spiritual guide of Richard Read known as the "shoe bomber". He added that, he after making enquiries made contact with one Arif *alias* Hashim (absconding accused No. 3), who agreed to help, and took them to a house in Rawalpindi, where they were informed that Pir Mubarik Shah Gilani had moved out from the said house. He then on behalf of Daniel Pearl requested Arif *alias* Hashim to help in finding the whereabouts of Pir Mubarik Shah Gilani. Arif *alias* Hashim, after a few days called him to confirm a meeting with a Contact ('*Mureed*') of Pir Mubarik Shah Gilani for the evening of 11.02.2002 at Akbar International Hotel, Rawalpindi. Asif Mehfooz Farooqui (PW-6),

further stated that on 11.01.2002, Arif *alias* Hashim after receiving him and Daniel Pearl at Akbar International Hotel, Rawalpindi went to the reception, to enquire about the contact of Pir Mubarik Shah Gilani. He was told that the said person was booked in room No. 411. When they got to room No. 411, it was locked. Daniel Pearl waited outside room No. 411, while they went down to the dining area, where Arif *alias* Hashim introduced him to the contact under the name of Bashir (later identified as Ahmed Omar Sheikh). Thereafter, all three went to room No. 411, where they along with Daniel Pearl discussed Pir Mubarik Shah Gilani for around three hours. A week later, Daniel Pearl informed him that Bashir (later identified as Ahmed Omar Sheikh) had arranged a meeting with Pir Mubarik Shah Gilani in Karachi.

29. The testimony of Asif Mehfooz Farooqui (PW-6) was supported by Amir Afzal (PW-7), who introduced himself, as a receptionist in Akbar International Hotel, Rawalpindi. He independently confirmed that one Muzaffar Farooq (later identified as Ahmed Omar Sheikh) checked in room No. 411 of Akbar International Hotel, Rawalpindi at 18.15 hours on 11.01.2002 and checked out at 14.13 hours on 12.01.2002, and that an 'English man' came to meet him during his stay at the hotel. More importantly, the witness admitted having prepared the 'check-in sheet' **(Exh.P10/4)**, which confirmed the particulars about the name of the guest (Muzaffar Farooq-later identified as Ahmed Omar Sheikh), and the time and date of check-in and check-out of the said guest. Thus, the contact of Pir Mubarik Shah Gilani, who had introduced himself as Bashir to Asif Mehfooz Farooqui (PW-6) and Muzaffar Farooq to Amir Afzal (PW-7), was later

identified by both the witnesses, as the same person, namely, Ahmed Omar Sheikh. Additionally, the evidence establishes that the deceit of Ahmed Omar Sheikh was fully known to Arif *alias* Hashim, as he was in complete knowledge of the two names he used in the hotel to hide his true identity, namely "Muzaffar Farooq", when checking in as a guest, and as "Bashir" when being introduced to Asif Mehfooz Farooqui (PW-6) and Daniel Pearl. Still, the true extent of the deceitful design forming the conspiratorial agreement between Ahmed Omar Sheikh and Arif *alias* Hashim, was by then not clear, and only became evident as events were to unfold later in Karachi.

30. The next prosecution witness is Nasir Abbas (PW-1), who deposed that he was a taxi driver, and a 'white man' hired his taxi at around 3.30 P.M., who was dropped at around 07.00 P.M. on 23.01.2002, outside Village Restaurant, Metropole Hotel, Karachi, where he met a person (later identified as Ahmed Omar Sheikh) and sat with him and left in a White Toyota Corolla car.

31. Nasir Abbas (PW-1) and Asif Mehfooz Farooqui (PW-6) identified Ahmed Omar Sheikh in two separate Test Identification Parades carried out by Irum Jahangir (PW-9), Judicial Magistrate, on 26.02.2002 and 06.03.2002, respectively. Both courts below have held not only that the two identifying witnesses are independent and trustworthy, but also declared the proceedings of the Test Identification Parades carried out by Irum Jahangir, Judicial Magistrate (PW-9) to comply with the governing law. These findings on fact and law appear to substantially comply with the

settled principles on the matter and thus would have legal credence.

32. The objection raised by the defence to the veracity of the testimony of Nasir Abbas (PW-1) was that he did not mention to Faisal Afridi and Marianne Pearl on 24.01.2002 that Daniel Pearl met and went with someone in a white Toyota Corolla car after he dropped him outside Village Restaurant, Metropole Hotel, Karachi. This challenge of the defence, is not of much factual or legal significance. One must appreciate that when Nasir Abbas (PW-1) is first confronted by Faisal Afridi and Marianne Pearl on 24.01.2002, it was but natural and reasonable for them to be concerned with Daniel Pearl's absence and not his abduction. In fact, according to the prosecution, the abduction of Daniel Pearl first surfaced when the email of 27.01.2002 was received. In these circumstances, it was logical and reasonable for Nasir Abbas (PW-1) in his initial statement of 05.02.2002 to the police under section 161, Cr.P.C., to not only mention but describe the person, Daniel Pearl last met and sat with in the white Toyota corolla car on 23.01.2002. It is worth noting that, when Nasir Abbas (PW-1) recorded his statement to the police under section 161, Cr.P.C. describing the "last seen" evidence, Ahmed Omar Sheikh was by then not in police custody, even according to the defence version. Thus, the assertion of the defence of police tutoring Nasir Abbas (PW-1) about the "last seen" evidence is contrary to the facts and bereft of merit.

33. More importantly, the findings of the two courts below regarding the veracity and the evidential value of the testimony of Nasir Abbas (PW-1) *qua* the "last seen" evidence of Daniel Pearl with

Ahmed Omar Sheikh on 23.01.2002 is neither absurd nor does it suffer from any misreading or non-reading of evidence. Similarly, the testimony of Asif Mehfooz Farooqui (PW-6), Amir Afzal (PW-7), and Nasir Abbas (PW-1) has concurrently been accepted as reliable and truthful, and the said three witnesses have been rightly declared to be independent and trustworthy. The careful review of their testimony establishes:

i. that accused Ahmed Omar Sheikh was using multiple fake names (Bashir and Muzaffar Farooq) and was consistently trying to conceal his identity.

ii. that accused Ahmed Omar Sheikh was the person who on 11/12.01.2002 met Daniel Pearl at Room No. 411 at Akbar International Hotel, Rawalpindi.

iii. that Daniel Pearl was “last seen” with accused Ahmed Omar Sheikh on 23.01.2002 in a White Toyota Corolla car near Metropole Hotel, Karachi.

34. To ascertain what transpired after Daniel Pearl arrived in Karachi, and his being ‘last seen’ with Ahmed Omar Sheikh on 23.01.2002, the confessional statements of the accused and the digital evidence produced by the prosecution would become very crucial.

35. Starting with the confessional statement of Fahad Naseem. It was made before Irum Jahangir, Judicial Magistrate (PW-9), on 21.02.2002. The questions asked, the certificate signed by her, and Fahad Naseem’s response thereto, would be relevant. The same, as noted therein, are reproduced for reference, hereunder:

"**FORM OF PROCEEDINGS IN RECORDING CONFESSION OF ACCUSED PERSONS**
(Section 164 of the Code of Criminal Procedure)

In the Court of 1st Magistrate, South, Karachi

The accused Fahad Naseem S/o Naseem Ahmed is brought by CIA Investigation Branch-II, Karachi Police Station before me at my Court at 1300 hours to have his confession recorded. A letter is given to me dated 21.02.2002 from the I.O. which is attached to the record. The offence is alleged to have been committed at Near Village Restaurant Towards East on 23.01.2002 at Nil and the accused is said to have been arrested at Flat No.01, Noman Grand City 6-C-J-B/No. 17 Karachi on 11.02.2002 at 0130 hours by Inspector Hameedullah Memon.

The accused is placed in custody of Court staff and the Police is directed to leave the premises.

The accused is warned that he is not bound to make a confession and that any statement he makes will be taken down in writing and may thereafter be used against him. He is then allotted time for reflection from 1300 to 1330 and during this period, the investigating police have had not access to him.

The accused is again brought before me not in open Court but in my chamber because it is more appropriate.

I have satisfied myself that there is no policemen in the Chamber or in any place whence the proceedings could be seen or heard.

The accused is asked if he is disposed to make a confession of his own free will. He replies as follows:
I want to give my statement with my own will.
The body of the accused is examined with his consent and it is found that no mark of hurt or maltreatment.

The accused is asked details as to the length of time during which and the duration wherein he has been in the custody of the police, do replies as follows:-

I am in Police custody from 13/14 days.

The accused is examined as follows, in order to ascertain whether he is disposed to make a confession of his own free will or under any inducement, threat or promise, the following and such other questions as may appear necessary to be made.

(Every question and every answer to be recorded in full)

Question:- Have you been given any inducement, threat or promise by the police or anyone else which induce you to make this confession?
Answer: No.
Question:- Have you been beaten, tortured or maltreated by the police?
Answer: No.
Question:- Has any family member of yours, male or female, been sent for by the police in order to pressurize you to confess?
Answer: No.
Question:- What are the circumstances which are inducing you to confess?
Answer: I want to give this statement for my safety.
Question:- Are you aware that I am a Magistrate, and if you make a confession, I am required to record it?
Answer: Yes.
Question: Are you aware that if you make a confession, it will be used against you at your trial and on its basis you may be convicted and sentenced for committing the offence of .....?
Answer: Yes.

> Question:- What have to say?
> Answer: I am Computer Programmer and I am free now a days because I am searching job. On 22-1-2002 my cousin Salman asked me to go with him for some important work and we will go at House No. D-17 in Muhammad Ali Society.
> Continued.....
>
> **CERTIFICATE**
>
> The accused make his confession and every question and answer is taken in full in writing, which is signed by him and also signed by me. The declaration required by Section 164(3) Criminal Procedure Code, is signed by me and appended and the whole is attached to the record. The confession has read over to the accused and he admitted it to have been correctly recorded.
>
> **I am satisfied, for the following reasons that the confession made by the accused is voluntarily.**
>
> The accused, after his confession has been recorded by me, is forwarded to the Central Jail, Karachi.
> Note: Mark of identification of accused Mole on left elbow.
> 21.02.2002 (Signature of Magistrate)
> **(emphasis Provided)**"

36. Given the above, it is noted that the steps taken by Irum Jahangir, Judicial Magistrate (PW-9), before and during the confessional statement of Fahad Naseem, clearly indicates that: firstly, all the requisite information to be communicated to the accused and questions to be asked therefrom, as mandated under sub-section 3 of section 164, Cr.P.C, were duly complied with; secondly, Irum Jahangir, Judicial Magistrate (PW-9) provided sufficient time and free space to Fahad Naseem to contemplate his decision to record the confession or otherwise; thirdly, the statutory certificate was signed by Irum Jahangir, Judicial Magistrate (PW-9), the recording Judicial Magistrate, and thereby raising a presumption of correctness within the contemplation of Article 91 of the Qanun-e-Shahadat, 1984; and finally, though the assurance to send Fahad Naseem was not recorded in the 'form of proceedings', he was not handed over to the police but remanded to judicial custody.

37. Additionally, there are three striking answers of Fahad Naseem to the questions asked by Irum Jahangir, Judicial

Magistrate (PW-9) before recording his confession, which would be relevant, within the contemplation of the exclusionary rule safeguarding voluntariness of confessions, as provided under Article 37 of the Qanun-e-Shahadat, 1984. The said questions, and the answers thereto by Fahad Naseem are that:

Question:-	Have you been given any inducement, threat or promise by the police or any one else which induce you to make this confession?
Answer:	No.
Question:-	Have you been beaten, tortured or maltreated by the police?
Answer:	No.
Question:-	What are the circumstances which are inducing you to confess?
Answer:	I want to give this statement for my safety.

The answer of Fahad Naseem to the first two questions distinctly reflects his relaxed state of mind and ease, reflecting his voluntariness in rendering the statement. It is, indeed, the answer to the third question that raises doubt regarding the reason for his making the confessional statement. The matter is clarified when Fahad Naseem is put the same question in his statement under section 342, Cr.PC. The question and his response thereto, were recorded in terms that:

> **Q. 16.** It has come in evidence that you in your judicial confession Ex. 50-A before the Judicial Magistrate authorized to record the same in which you have implicated yourself as well as other accused persons regarding commission of crime of abducting ransom conspiracy raising of demand and taking all such steps which were necessary and incidental to the establishment of the offence committed by you. What have you to say?
>
> **Ans.** This is incorrect as the learned J. Mag. has frankly admitted before the court during the trial that judicial confession was result of torture and it was extorted from me by the police under duress. This statement being not voluntarily and is inadmissible in evidence and can not be accepted.

38. On a careful review of the above question and the response thereto, establishes that instead of explaining who or what threatened his safety, he introduced the factum of police torture,

which he had categorically denied at the time of recording his confession before Irum Jahangir, Judicial Magistrate (PW-9). Thus, it would not be appropriate to accept this new stance and that too at a belated stage. Had he explained the 'inducement' for his confessing, without being contrary to his earlier response, it could have been considered a valid ground to discard his confession, but he did not do so.

39. It seems the confusion regarding police torture on Fahad Naseem during his police custody first crept in, when Irum Jahangir, Judicial Magistrate (PW-9), during her cross-examination by the counsel for the accused Ahmed Omar Sheikh, stated that: *"it is fact that the confession is not correct if it appears to the court, in case of the confession accused says that he is beaten by the police such confession is discarded. It is fact that to my question that whether accused was beaten tortured or maltreated by the police he replied that he has been maltreated and beaten and not today and not now. I am shown the confession at Page No. 02 it has been mentioned that body of the accused is examined which contains no finding and it is found that the finding as blank."* Later, the witness referring to the confessional statement of Fahad Naseem stated: *"it is fact that from the confessional statement of the accused I am of the conclusion that the confession was not voluntarily, Because, voluntarily says that it is according to the circumstances of the case."* This assertion of Irum Jahangir, Judicial Magistrate (PW-9), has to be contextualized with her statement as a whole, and should not be considered in isolation, and that too without considering what Fahad Naseem actually

stated in response to the query of 'police torture' sought by the Judicial Magistrate before recording his statement. More importantly, there is no specific statutory requirement stipulated in section 164, Cr.P.C. mandating the Magistrate to inform the accused that he would not be sent back to police custody should he decide to render a confession or not. The essential element was the satisfaction of the recording Magistrate that the confessional statement was voluntary. The fact that the recording Magistrate affixed her signature on the certificate revealed her state of mind, that at the relevant time when the confessional statement was being recorded, the said confession was voluntary. Thus, the absence of the said specific instruction to the accused by the recording Magistrate cannot be the sole reason for the court to discard the voluntariness or relevancy of the confessional statement.[20]

40. On reviewing the matter, the picture that emerges is that: firstly, the issue of 'police torture' of Fahad Naseem was introduced during the cross-examination of Irum Jahangir, Judicial Magistrate (PW-9); secondly, that Fahad Naseem in his confessional statement out rightly denied being tortured during police custody; and lastly, Fahad Naseem, instead of explaining the *'inducement'* he had for his *'safety'*, as referred to in his statement under section 342, Cr.P.C., took the cue of 'police torture' from the statement of Irum Jahangir, Judicial Magistrate (PW-9), and introduced the same in his statement under section 342, Cr.P.C., as a completely new stance.

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[20] Nanji vs The State (1957 CriLJ 199); Nakula Chandra Aich vs. State of Orissa (1982 CriLJ 2158)

41. Moreover, as noted earlier, there was a statutory presumption of correctness attributed to the confessional statement of Fahad Naseem, within the contemplation of Article 91 of the Qanun-e-Shahadat, 1984, and thus to rebut the same, prompt, serious and effective grounds were required to be agitated, which are not forthcoming in the present case. One may, in such circumstances, ignore the belated and bold retraction of his confession and proceed to consider his confession, as a substantial piece of incriminating evidence against him, and circumstantial evidence against the other co-accused.

42. Alternatively, the opinion of Irum Jahangir, Judicial Magistrate (PW-9), regarding the voluntariness of Fahad Naseem's confession, which she expressed during her cross-examination, would best be appreciated, once we consider the same in juxtaposition with the confessional statement of Salman Saqib, and her opinion thereon at the time of recording the same, and her testimony as a witness. In this regard, it is noted that Salman Saqib rendered his confessional statement before Irum Jahangir, Judicial Magistrate (PW-9) on 01.03.2002. Two crucial glaring facts come to light, which appears to have escaped the attention of the recording judicial magistrate: firstly, the marked delay in recording his confessional statement *qua* his cousin, the co-accused Fahad Naseem, whom she had examined and recorded his confessional statement nine days earlier; second, the disturbing reply of Salman Saqib admitting to police torture during his police custody.

The question and the reply thereto were as under:

Question:- Have you been beaten, tortured or maltreated by the police?
Answer: I have been beaten but no at present.

43. What is pertinent to note is that there can be no single formula or set criteria for determining the voluntariness of a confessional statement. Each case has to be considered on its own particular circumstances and facts. In the case of Salman Saqib, it is noted with concern that there is a marked unexplained delay in his approaching the Judicial Magistrate for recording his confessional statement. This delay is made more profound because his cousin, Fahad Naseem, a co-accused in the present case, arrested on the same day as him, had earlier recorded his confessional statement, wherein he had implicated Salman Saqib. There is no explanation or circumstance, which would justify the said delay. Coupled with the distinct delay is the categoric statement of Salman Saqib being subjected to 'police torture' during his police custody. Thus, viewing these circumstances accumulatively, there remains no manner of doubt that the confessional statement of Salman Saqib is not voluntary, and thus it fails to pass the statutory test provided under Article 37 of the Qanun-e-Shahadat, 1984.

44. Given the above, the opinion of Irum Jahangir, Judicial Magistrate (PW-9), *qua* the voluntariness of the judicial statement of Fahad Naseem is contrary to the facts, and thus would not be of much legal value. Moreover, it is alarming to note that when it came to the confessional statement of Salman Saqib, who had actually stated to have been tortured in police custody, she did not with the same vehemence declare his confessional statement to

lack voluntariness. Even otherwise, the legal jurisdiction of the Judicial Magistrate recording the confessional statement of an accused is vested under section 164, Cr.P.C., which provides wide power to the recording Judicial Magistrate to refuse recording the confession, if it finds the same to lack voluntariness. But once, the certificate of correctness is signed, then the jurisdiction to adjudge the relevancy of confessional statement, within the contemplation of Articles 37, 38, 39 and 40 of the Qanun-e-Shahadat, 1984 vests upon the trial court, and not the Judicial Magistrate, who recorded the same. Thus, it may be safe to state that the opinion of Irum Jahangir, Judicial Magistrate (PW-9), as to the qualitative value of the statement made before her or the legal effect of existence of certain conditions or facts amounts to appreciation and evaluation of evidence, falls exclusively within the domain of the trial court to adjudge, and not the Judicial Magistrate, who had recorded the confessional statement.

45. To sum up, the confession of Fahad Naseem, shows the ease with which each material fact relating to his introduction to Ahmed Omar Sheikh and their discussions in the two meetings they had, was narrated with all essential details, which provides a complete picture of the criminal conspiracy leading to sending the ransom and death threat emails of 27.01.2002 and 30.01.2002, respectively.

46. Now, moving to the digital evidence, which links the accused Ahmed Omar Sheikh and Fahad Naseem to the charge of criminal conspiracy. Jawed Abbas (PW-3) produced different emails dated 27.01.2002 and 30.01.2002 (**Exh.P/8**). Importantly, the email dated

27.01.2002 (**Exh.P/8**) was stated to be sent from internet café and the identity of the sender could not have been established. Whereas, the email dated 30.01.2002, which according to the prosecution's case was also sent by Fahad Naseem was proved through independent and qualified witnesses, namely, Shaikh Naeem (PW-14) and Mehmood Iqbal (PW-18). The said email read as under:

> "Our purpose was not to cause any trouble for Pakistan, only to take it out of the slave-mentality it has towards Amreeka. Look, we took captive only one amreekan and our government kicked up such a fuss. Are not those Pakistanis detained in Cuba human being? Why is our government silent about them? Are there not amongst them some who may be wrongly accused? Why are they not allowed to prove themselves in a proper court instead of being left to the brutal decision of a vengeful amreekan war machine? Pakistanis have a right that their government should try to safeguard their right to the utmost of its ability. Then there are those Pakistanis who are languishing in detention in amreeka but who has no connection to terrorism or to any crime whatsoever. Why are they not allowed access to courts and lawyers to speedily clear themselves?
> Mula Zaif was the ambassador to Pakistan. How dare Amreeka break all international standards and take him into custody? Is this not a great insult for all Pakistanis? Amreeka took the payment for the f-16s and it then refused to deliver them and also to return the money, why is the government tolerating such outrageous high-handedness by amreeka? That money belongs to the Pakistani government and we will damn well get it back.
> Brother pakistanis, we may be militarily and economically weaker than some countries, but we are not cowards.
> We have interrogated mr.D.Pearl and we have come to the conclusion that contrary to what we thought earlier he is not working for the cia. Instead he is working for mossaad. therefore, we will execute him within 24 hours unless amreeka fulfils our demands. we apologise to his family for the worry caused and we will send them food packages just as amreeka apologised for collateral damage and dropped food packets on the thousands of people whose mothers, fathers, sisters and brothers, wives, sons and daughters, grandparents and grandchildren it had had killed. We hope Mr danny's family will be grateful for the food packets that we send them just as the amreekan public expected the afghans to be grateful for the food packets its airforce was dropping on them.
> We warn all amreekan journalists working in Pakistan that there are many in their ranks spying on Pakistan under the journalist cover. therefore we give all amreekan journalists 3 days to get out of Pakistan. anyone remaining after that will be targeted. Some of our brothers in the Pakistani government have assured us that they will do their best to ensure the rights of all Pakistanis in custody the world over. May God enable them to fulfil their promise. If they break their promise then rest assured that there are many pakistanis who are ready to take steps for their wrongfully suffering brothers. and many amreekans who are sitting ducks."

47. Mehmood Iqbal (PW-18) deposed that he worked for the last six years in Web-Net Communication **("company")**, an internet service provider firm, and he produced record from the computer server of the company, as **Exh. 64-A**. He testified that Mr. Zahoor Bashir the Security Manager of U.S Consulate on 31.01.2002, requested him to locate Internet Protocol **("IP")** addresses of two emails, including the forwarded email **(pages 1 and 2 of Exh. 64-A),** which in fact was the crucial ransom/death threat email of 30.01.2002, with following particulars:

I. Sender's email address as strangepeoples@hotmail.com
II. Public IP address 202.5.147.3
III. Date and time (30-01-2002, 9:19:14 GMT)

48. From the record of Web-Net Communications **(Exh. 64-A page 3 to 6)**, Mehmood Iqbal (PW-18) submitted that at the relevant time on 30.01.2002, the person, who emailed from strangepeoples@hotmail.com used an internet connection, which was in the name of Shaikh Naeem (PW-14) against telephone number 8125028, who was one of the customers of the company **(page 6 of Exh. 64-A).** It may be noted that pages 4 and 5 of Exh-64-A contain the hyperlinks of the images sent through email ID strangepeoples@hotmail.com.

49. In this sequence, the testimony of Shaikh Naeem (PW-14) was that he was an internet cable provider and extended internet service to the users through cable. He further testified that on 08.02.2002, Hameedullah Memon, Inspector of Police (PW-23), visited him and inquired about how many users he had, and asked

about complete record of a specific user, who emailed on specific date and time. The witness further submitted that he provided him the Contract Form of the user, who had emailed the specific email, and the same was in the name of Fahad Naseem **(Exh.58-A),** a Compact Disk (CD) of log files from his local Server (three system generated log files) **(Exh.58-B),** and Payment Register/billing record **(Exh.58-C).** The Contract Form (**Exh.58-A)** was examined, it was in the name of Fahad Naseem, with a signature affixed thereon. I compared the said signature on the Contract Form with his admitted signatures on his two *Wakalatnamas* already placed on the record, and found the same to be of the same person.

50. During his cross examination, Shaikh Naeem (PW-14) further explained that Fahad Naseem was assigned a special User ID, which was password-protected, and the user was at liberty to change it at any time. He further deposed that the user was registered as User 66 in his internal record. He elaborated further that, he allocated private IP addresses to his users and the system at his end converted them to Public IP address allocated to him during transmission/translation process. The witness was subjected to a lengthy cross-examination, however, he established through system generated record **(Exh.58-B),** that an email from Hotmail account on 30.01.2002 at 14:19:43 PST was sent from the system of user allocated to Fahad Naseem.

51. Thus, from the digital foot-prints, as produced by Shaikh Naeem (PW-14) and pointed out by Mehmood Iqbal (PW-18), the two totally independent and professionally qualified persons, it is established beyond any reasonable doubt that email dated

30.01.2002 at 14:19:43 PST, which was sent from a Hotmail account, and it contained the information regarding kidnapping of Daniel Pearl and demands for ransom, originated from a connection owned by Fahad Naseem accused. These crucial pieces of evidence, regarding the email of 30.01.2002, create a complete digital chain, which leads to its origin, an account maintained in the name of Fahad Naseem. Accordingly, the requisite legal independent corroboration to the confession of Fahad Naseem has been duly provided by the two independent witnesses - Shaikh Naeem (PW-14) and Mehmood Iqbal (PW-18). When the digital foot print linking the email of 30.01.2002 to Fahad Naseem is considered in juxtaposition with his confessional statement, it completes the picture of how he met accused Ahmed Omar Sheikh and their discussions regarding the preparation and execution of sending ransom demands.

52. Keeping the prosecution evidence in its true and correct perspective, it is established beyond any reasonable doubt that: the identity of accused Ahmed Omar Sheikh, and him being part of the conspiratorial agreement with Arif *alias* Hashim and Fahad Naseem has been duly established; Ahmed Omar Sheikh was the person who met Daniel Pearl in Room No. 411 Akbar International Hotel, and was also 'last seen' with Daniel Pearl on 23.01.2002; the email dated 30.01.2002 at 14:19:43 PST was sent from the Hotmail account of accused Fahad Naseem on the directions of Ahmad Omar Sheikh.

53. As for Fahad Naseem, his confession confirms his guilt of being part of criminal conspiracy to abduct Daniel Pearl for

ransom. In this regard, he stated with such clarity that when he first asked about the details of the abduction, he was snubbed by Ahmed Omar Sheikh not to interfere in the said matter. However, he further candidly confessed that on 22.01.2002, Ahmed Omar Sheikh handed over to him, the written scripts of ransom note to be emailed, which he consented to send. Thus, the moment Fahad Naseem communicated his acceptance to Ahmed Omar Sheikh that the ransom demand in the written scripts would be emailed, he entered in the conspiratorial agreement to commit a crime, namely, a criminal conspiracy of abduction for ransom. His subsequent actions, thereafter, would not materially affect his culpability of committing the offence of criminal conspiracy. Indeed, it may constitute committing another crime – aiding or abetting the actual crime. In the present case, it is noted that his very act of emailing the ransom notes would constitute another crime - abduction of Daniel Pearl for ransom under section 365-A, PPC, which would be independent of his criminal culpability to commit the offence of criminal conspiracy of abducting him for ransom under section 120-A, PPC.

54. The confessional statement of Salman Saqib, as discussed earlier, lacks voluntariness within the purview of Article 37 of the Qanun-e-Shahadat, 1984. The other pieces of prosecution evidence that connect him to the crime are the testimony of Rajesh Kumar (PW-13) and Mohammad Arif (PW-16). These two witnesses depose the purchasing of printer, scanner and polaroid cameras by Salman Saqib. To my mind, their testimony is of no legal credence or value, as the very recoveries of the said incriminating articles, at the time

of arresting Fahad Naseem, are not beyond reproach. It is the case of the prosecution that Fahad Naseem was arrested from Flat No.01, Noman Grand City 6-C-J-B/No. 17 Karachi on 11.02.2002 at 0130 hours, and on search of the said premises, a Del laptop, printer, scanner and written scripts of notes in Urdu and English were recovered. It does not appeal to reason and common sense that a person, who has sent *via* emails, ransom and death threats, would retain the written scripts thereof, to be recovered from his dwelling after eleven days of committing the crime. More than that, what has cast a serious doubt upon the time, place and manner of arrest and the recoveries made therefrom, is the testimony of another prosecution witness, Ronald Joseph (PW-8) who testified that he was handed over a Del Laptop for forensic examination on the evening of 04.02.2002 at the United States of America Consulate at Karachi.

In addition, Ronald Joseph (PW-8) produced two Reports, which the prosecution claims to have forensically confirmed that the examination of the hard disc of the subject Del Laptop by Ronald Joseph (PW-8) had commenced on 07.02.2002. These facts completely contradict the prosecution's version of recovering Del laptop on 11.02.2002. Similarly, the other recoveries made in the same raid on 11.02.2002, and in particular, the printer and the scanner would also become doubtful. Indeed, when one piece of evidence recovered is found to be tainted, then relying on the other incriminating material recovered therewith would not be just and legally correct. Thus, reliance thereon in any manner would be against the safe administration of criminal justice.

55. Thus, the only evidence to link Salman Saqib with the crime is the confession of the co-accused Fahad Naseem. This single piece of evidence could not be more than circumstantial evidence, and would not alone, suffice to prove that Salman Saqib is guilty of committing criminal conspiracy to abduct Daniel Pearl for ransom. Convicting a person solely on the basis of the confession of a co-conspirator on the strength of Article 23 of the Qanun-e-Shahadat, 1984 would surely run counter to the settled principles of safe administration of criminal justice enshrined in Article 37 *(supra).* Thus, when the judicial confession of Salman Saqib has been legally discarded, then there remains no reliable evidence, other than mere suspicion of him being part of the conspiracy. This being so, the condition precedent of there being '*reasonable grounds to believe'* Salman Saqib was part of a conspiratorial agreement, as envisaged under Article 23 of the Qanun-e-Shahadat,1984 was starkly lacking. Accordingly, the statements, writings or actions of Fahad Naseem could not implicate Salman Saqib to be part of the criminal conspiracy, within the contemplation of Article 23 of the Qanun-e-Shahadat, 1984. In these circumstances, one can safely conclude that the prosecution did not produce sufficient trustworthy evidence to prove the charge of criminal conspiracy against Salman Saqib.

As compared to Salman Saqib, the case of the prosecution against Sheikh Adil, is much weaker. Apart from the judicial confessions of Fahad Naseem and Salman Saqib, prosecution was unable to produce any credible evidence against him. And when the judicial confession of Salman Saqib has been legally discarded

for being not voluntary, the only evidence against Sheikh Adil for committing criminal conspiracy to abduct Daniel Pearl for ransom is the statement of a co-conspirator, namely Fahad Naseem. As discussed earlier, the sole statement of a co-conspirator would not fulfill the condition precedent of there being '*reasonable grounds to believe'* Sheikh Adil was part of a conspiratorial agreement, as envisaged under Article 23 of the Qanun-e-Shahadat,1984.

Charge of Abduction

56. Both the courts below have concurrently found that the prosecution has proved the charge of abduction of Daniel Pearl against Ahmed Omar Sheikh. It is with regard to the proof of demand of ransom by the accused that the appellate court has rejected the stance taken by the prosecution. This has led Ahmed Omar Sheikh to challenge his conviction and sentence for abduction under section 362, PPC awarded by the appellate court.[21]

57. The prosecution has built the case of abduction on the following pieces of evidence: (i) the "last seen" evidence of him being with Ahmed Omar Sheikh, as testified by Nasir Abbas (PW-1); (ii) and also his identifying Ahmed Omar Sheikh in an identification parade carried out by a Judicial Magistrate; (iii) the supporting testimony of Jameel Yousaf (PW-2); (iv) and the adverse inference drawn from Ahmed Omar Sheikh being unable to reasonably justify his meeting and taking Daniel Pearl in the white Toyota Corolla car on 23.01.2002, and his whereabouts thereafter, in his statement under section 342, Cr.P.C.

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21 Criminal. Appeal No. 602 of 2020

58. It is important to note that the prosecution claims to have arrested Ahmed Omar Sheikh during the night of 13.02.2002 from a place near Jinnah International Airport, Karachi and recovered from his possession his personal belongings, which included written scripts of the ransom and threat emails of 27.01.2002 and 30.01.2002, CNIC in the name of Muzaffar Farooq, a photocopy of CNIC in the name of Bashir, and receipts of purchases of polaroid cameras, scanner and printer. To start with, it does not hold to reason for any criminal, more so of one, whom the prosecution claims to be an international terrorist, to have in his possession such incriminating pieces of evidence almost twenty-one days after having committed the crime. Reason, logic, and common sense belies this very stance of the prosecution. Hence, all the recoveries made from Ahmed Omar Sheikh at the time of his arrest are undoubtedly suspicious, and thus, warrant to be discarded from consideration against the accused.

59. Similarly, the prosecution version relating to the arrest of Fahad Naseem from a flat on 11.02.2002 at 0130 hours, and the recovery of a Del laptop, and other incriminating evidence also begs reasonable explanation.[22] It is difficult to fathom that a criminal would retain such incriminating evidence in his dwelling place after committing the crime. More strikingly, the testimony of another prosecution witness, Ronald Joseph (PW-8) casts a very serious doubt on the recoveries so adamantly presented by the prosecution. These facts completely contradict, the case of the

22 Paragraph 54.

prosecution, as to the recovery of Del laptop on 11.02.2002 at the time of arresting Fahad Naseem.

60. The worthy counsel for the parents of Daniel Pearl, when confronted to the above contradiction in the prosecution evidence, contended that the same be considered, as being 'fruits of a poisonous tree' and be held reliable, being admissible in evidence. The contention of the learned counsel, in the circumstances of the present case, is rather misplaced. From the forensic reports it has not been legally established that the recovered Del Laptop was linked to Fahad Naseem. The only evidence to link the two was the recovery of the Del laptop from the flat, wherefrom Fahad Naseem was arrested on the night of 11.02.2002. When the date of his arrest is made doubtful by the very statement of Ronald Joseph (PW-8) and the Reports, the link between the emails in the hard disc of the Del Laptop and Fahad Naseem is broken. Had the Report contained any private material relating to Fahad Naseem, independent of the ransom notes, the crucial independent link between him and the Del laptop would have been established, and the principle of 'fruits of a poisonous tree' could have been applied. In absence thereof, the contents of the Reports would be of no legal effect against accused Fahad Naseem. Similarly, the recovery of the printer and the scanner and its link to Fahad Naseem would also become doubtful, and thus could not be taken in evidence against him or any other co-accused.

61. The defence has also produced Rauf Ahmad Sheikh (DW-1), a serving District & Sessions Judge, who testified that he on 05.02.2002 personally took Ahmed Omar Sheikh to the residence

of Mr. Javed, D.I.G. Lahore situated at G.O.R-I, Lahore, and made him surrender in the instant case. The very fact that a serving District & Sessions Judge undertakes to render his testimony in a criminal case in support of the accused, even if he is related to him, should not be taken lightly, especially, when he states, the time, place and person before whom Ahmed Omar Sheikh surrendered. In such circumstances, the prosecution could have moved the trial court to summon Mr. Javed, a serving Deputy Inspector General of Police, as a witness to testify otherwise which they did not.

62. The above discussion, safely establishes, without any manner of doubt, that Daniel Pearl was 'last seen' with Ahmed Omar Sheikh, and the evidence to that effect has correctly and concurrently been held worthy of credence by the two courts below. To my mind, there appears no valid ground to differ with the said findings of the two courts below.

63. Once the prosecution has proved that Daniel Pearl was "last seen" with Ahmed Omar Sheikh, then the "legal burden" under Article 117 of the Qanun-e-Shahadat, 1984 on the prosecution would stand discharged. And then for the accused to avoid conviction for the charge of abduction, he would have to discharge the "evidential burden" under Article 122 *(supra)* to provide a plausible explanation or produce evidence of facts to nullify the stance established by the prosecution. A mere bold evasive denial of Ahmed Omar Sheikh in his statement under section 342,

Cr.P.C. would not legally suffice to escape criminal culpability.[23] Similarly, the confessional statement of Fahad Naseem duly corroborated by independent evidence has established beyond any manner of doubt that accused Fahad Naseem in the execution of conspiratorial agreement with accused Ahmed Omar Sheikh sent the email, making the demand for ransom for the release of Daniel Pearl.

64. In view of the above, the prosecution has successfully proved the charge of abduction for ransom under Section 365-A, PPC against accused Ahmed Omar Sheikh and Fahad Naseem.

Charge of Murder

65. The main thrust of the prosecution to prove the charge of murder against the accused was based on four pieces of evidence:(i) "last seen" evidence of Nasir Abbas (PW-1); (ii) the video recording of the murder scene tendered in evidence by John Mulligan (PW-12); (iii) the admission of Ahmed Omar Sheikh that Daniel Pearl was dead during the remand proceedings before the Judicial Magistrate on 14.2.2002; and (iv) the wide press reporting of the said admission.

(i) Last Seen Evidence

66. "Last seen" evidence is merely a circumstantial evidence, and that too a weak type of evidence, which alone cannot sustain the weight of a capital punishment, and would require other independent corroborative evidence to effect conviction. In a case of murder, where the prosecution case rests on "last seen" evidence, then corroboration would be required from other circumstantial

23 Rahmat v The State (PLD 1997 SC 515); (AIR 1927 Lah. 541); (PLD 1956 FC 123); (1972 SCMR 15); PLD 1966 SC 644.

evidence; each piece of such evidence would have to be proved to complete the chain, stemming from the accused being "last seen" with the deceased, leading to his death. To achieve this, the prosecution has to prove that the death of the deceased took place in close proximity to the time and place, where the accused was "last seen" with the deceased. Thus, the evidentiary value of the "last seen" evidence of an accused with the deceased will depend upon the facts and circumstances of each case, and for a court to reach a conclusion of guilt of the accused, such circumstances must not only be proved, but must also be found to be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt.[24]

67. Given that the prosecution proved the "last seen" evidence of Daniel Pearl before his disappearance being in the company of Ahmed Omar Sheikh, would not legally suffice to prove the charge of murder against Ahmed Omar Sheikh. As correctly observed by the appellate court, what was essential for the "last seen" evidence to be materially relevant in proving the charge of murder was when there was evidence to prove that the time and place of the murder of Daniel Pearl was in close proximity to where Daniel Pearl was "last seen" with Ahmed Omar Sheikh. As the prosecution failed to produce any such evidence, the said confirmed judicial finding on the "last seen" evidence would be of no avail to prove the charge of murder against Ahmed Omar Sheikh, much less the other three accused.

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24 Khurshid vs. The State (PLD 1996 SC 305) Muhammad Amin vs The State (2000 SCMR 1784)

(ii) Video Recording

68. John Mulligan (PW-12) produced a video cassette recording of a murder scene. The prosecution contended that the same was of Daniel Pearl, while the defence vehemently disputed the same. The law regarding admission of audio or video evidence has recently been considered in the case of **Ishtiaq Ahmed Mirza and others v Federation of Pakistan**[25], wherein, *inter alia*, it was held that not disclosing the source of obtaining the video or forensically confirming it not to be tampered would render its admissibility at naught. In the present case, it is noted that the prosecution was neither able to produce any evidence regarding the source of the said video recording nor proved forensically that the same was not tampered. More importantly, as recorded by the appellate court, the video cassette recording did not show any of the accused committing the offence or being present at the time and place of occurrence shown in the video. Thus, the video cassette recording produced by the prosecution is of no legal avail to prove the charge of murder against all four accused.

(iii) Admission made on 14.2.2002

69. The prosecution has produced four witnesses namely Faisal Noor (PW-4), Ather Rasheed Butt (PW-5), Rao Muhammad Aslam (PW-22) and Hameedullah Memon (PW-23), all contending that Ahmed Omar Sheikh during his first remand proceedings before the Arshad Noor Khan, Administrative Judge, Anti-Terrorism Court-III, Karachi admitted, *inter alia;* that he had abducted Daniel Pearl, who was by then dead. The prosecution further contends that this

25 (PLD 2019 SC 675)

admission on the part of Ahmed Omar Sheikh was widely published in the national newspapers.

70. Arshad Noor Khan, Administrative Judge, Anti-Terrorism Court, Karachi before whom the alleged admission was stated to have been made on 12.04.2002 was not produced as a witness by the prosecution. The reason asserted by the prosecution for not producing him as a witness was that Article 4 of the Qanun-e-Shahadat, 1984 barred a Magistrate to be produced for the said purpose. This submission is contrary to the record. All four prosecution witnesses produced to prove the said admission of Ahmed Omar Sheikh, in consonance testified that the admission of Ahmed Omar Sheikh was made, while he addressed the Presiding Judge, Arshad Noor Khan, Administrative Judge, ATC, Karachi in the court room, and that too in the presence of local and foreign journalists. This being so, the non-production of Arshad Noor Khan, Judge, ATC, Karachi after applying for the requisite permission from the Federal Government and the High Court of Sindh nullifies their final contention that the judicial officer could not be produced in view of the bar contained in Article 4 of the Qanun-e-Shahadat, 1984. The matter became more profound, as Arshad Noor Khan, Judge, ATC was present before the Anti-Terrorism Court, Hyderabad on 22.05.2002 to record his testimony, when on the same day, the prosecution moved an application for his withdrawal, as a prosecution witness.

71. It is also noted that the order sheet of the remand proceedings of 14.02.2002 is silent regarding the asserted admission of Ahmed Omar Sheikh. It was, thus, more of a reason

for the prosecution to have produced Arshad Noor Khan, Judge, ATC, Karachi, as a prosecution witness. His testimony was the 'best evidence' available with the prosecution to prove the asserted admission of Ahmed Omar Sheikh. This act of withdrawing the name of Arshad Noor Khan, as a prosecution witness, by itself, renders an adverse inference against the prosecution, within the contemplation of Article 129(g) of the Qanun-e-Shahadat, 1984.

(iv) Press reports of Ahmed Omar Sheikh's admission

72. As for Press reports regarding the alleged statement of Ahmed Omar Sheikh is concerned, as discussed in detail earlier[26], when the authors of press reports have not been produced to own their reporting, admitting the said reports, and that too, as proof of the contents thereof, would be against safe administration of criminal justice.

73. In view of the above deliberations, we find that the prosecution has failed to prove the charge of murder against all four accused.

Charge of Terrorism

74. The term "terrorism" has been defined in section 6 of Anti-Terrorism Act, 1997. A Larger Bench of this Court in the case of **Ghulam Hussain v. The State**[27], has explained what acts would constitute an offence triable under the ATC. After deliberating exhaustively on the conflicting precedents, this Court finally held that:

> "16. For what has been discussed above it is concluded and declared that **for an action or threat of action to be accepted as terrorism within the meanings of section 6 of the Anti-Terrorism Act, 1997 the action must fall in subsection (2) of section 6 of the said Act and the use or threat of such action must be designed to achieve any of the objectives specified in clause (b) of subsection (1) of section 6 of that Act or the use**

26 Paragraph 16 and 17.
27 (PLD 2020 SC 61)

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

75. When the facts of the present case are reviewed, it is noted that the motive of the crime was not any private dispute or vendetta against the Daniel Pearl, but went beyond it. The contents of the ransom and death threat email of 30.01.2002, make it clear that the motive of the accused to carry out the crime did not relate to any private dispute or vendetta with Daniel Pearl, but in fact, the matter was clearly the use of a threat designed to intimidate not only the Government of Pakistan, but also the foreign government and organisations to create a sense of fear and insecurity in the society. Thus, viewing the 'design' and 'purpose' of the Ahmed Omar Sheikh and Fahad Naseem to carry out the abduction of Danial Pearl for ransom, in the light of the principle laid down in **Ghulam Hussain's** case (*supra*), brought the commission of the crime within the mischief of the term "Terrorism", as envisaged under clause (b) of subsection (1) of section 6 of the ATA, 1997

76. Thus, it would be correct to state that the prosecution was not only able to prove that the acts of Ahmed Omar Sheikh and Fahad Naseem, constituted 'abduction for ransom' within the purview of clause (e) of sub-section 2 of section 6, and the 'design' and 'purpose' of the crime, fall squarely in term of clause (b) of sub-section 1 of section 6 envisaged under ATA, 1997. Accordingly,

Ahmed Omar Sheikh and Fahad Naseem are found guilty of the offence of terrorism punishable under Section 7 of the ATA, 1997.

77. As for the reliance of the learned counsel for the parents of Daniel Pearl upon the judgment in **Nazir Khan and others v. State of Delhi**[28] delivered by the Supreme Court of India, wherein, Ahmed Omar Sheikh along with others were stated to be nominated accused persons in FIRs registered in different Police Stations in Delhi, India for the offences of kidnapping foreigners for ransom; suffice it to state that Ahmed Omar Sheikh was never charged, tried or convicted in any of said cases. Thus, the cited judgement cannot be read or construed against him in any manner, whatsoever.

Inordinate delay- Right to expectancy of life

78. It is extremely disturbing to note that the appeal of Ahmed Omar Sheikh against the conviction and sentence of death passed by the Anti-Terrorism Court dated 15.07.2002 remained pending before the High Court of Sindh for almost two decades. Admittedly, it is not the case of the prosecution that Ahmed Omar Sheikh delayed or was in any manner a cause for the delay in deciding his appeal. This being so, the State, and in particular, its criminal delivery system, is responsible for his prolonged incarceration in the death cell, without providing him his right to be dealt with in accordance with the law; of being heard by an appellate court in a reasonable time. This prolonged incarceration of around two decades in the death cell gave rise to his 'right to expectancy of life', entitling him to the sentence of life imprisonment, and not

[28] (AIR 2003 SC 2247)

death. Even otherwise, when two worthy brother Judges having acquitted Ahmed Omar Sheikh of all charges, convicting and saddling him with the sentence to death, would not be akin to safe administration of criminal justice.

Conclusion

In view of the above deliberations, it is my considered view that:

I. The prosecution has not been able to prove the charges framed against **Salman Saqib** and **Sheikh Mohammad Adil**, and they have been rightly acquitted by the learned Appellate Court. Therefore, Criminal Appeal No. 600 of 2020 & Criminal Petition No. 1086 of 2020 against their acquittal are dismissed and the judgement of the learned Appellate Court is maintained.

II. The prosecution has been able to prove beyond reasonable doubt that **Ahmed Omar Sheikh** and **Fahad Naseem** have committed the offences under Section 365-A, PPC, Section 7 of the Anti-Terrorism Act, 1997 and Section 120-B, PPC, thus, they are convicted for the said offences and sentenced to imprisonment for life on each count. Hence, Criminal Appeal No. 599 of 2020 and Criminal Appeal No. 600 of 2020 (*to the extent of Fahad Naseem*) are allowed and Criminal Petition No. 1085 of 2020 and Criminal Petition No.1086 of 2020 (*to the extent of Fahad Naseem*) are converted into appeal and is also allowed and the judgement of learned Appellate Court is modified, accordingly.

III. Criminal Appeal No. 601 of 2020 for enhancement of sentences (*passed by the trial court*) of Fahad Naseem,

Salman Saqib and Sheikh Muhammad Adil accused is dismissed.

IV. Criminal Appeal No. 602 of 2020 filed by **Ahmed Omar Sheikh** against his conviction and sentence is also dismissed.

The above deliberations were in furtherance of views rendered in the short order (minority view) dated 28.01.2021, which reads:

> "For the reasons to be recorded later, Criminal Appeals No. 599, 600 & 601 of 2020 and Criminal Petitions No. 1085 & 1086 of 2020 are partly allowed in the terms that Ahmed Omer Shaikh and Fahad Nasim are convicted under sections 365-A & 120-B, PPC and section 7 of the Anti-Terrorism Act, 1997 each and sentenced to imprisonment for life on each count. All the sentences passed against both of the convicts shall run concurrently. The benefit under section 382-B, Cr.P.C. shall be extended to them. To the extent of Syed Salman Saqib and Shaikh Muhammad Adil Criminal Appeals No. 599, 600 & 601 of 2020 and Criminal Petitions No. 1085 & 1086 of 2020 are dismissed and their acquittal is maintained on all the charges, they shall be released from the jail forthwith if not required to be detained in connection with any other case. Criminal Appeal No. 602 of 2002 filed by Ahmed Omer Shaikh is dismissed."

Judge