

IN THE SUPREME COURT OF PAKISTAN
(Advisory Jurisdiction)

Present:

Justice Qazi Faez Isa, CJ
Justice Sardar Tariq Masood
Justice Syed Mansoor Ali Shah
Justice Yahya Afridi
Justice Amin-ud-Din Khan
Justice Jamal Khan Mandokhail
Justice Muhammad Ali Mazhar
Justice Syed Hasan Azhar Rizvi
Justice Musarrat Hilali

REFERENCE NO. 1 OF 2011

[Reference by the President of Islamic Republic of Pakistan under Article 186 of the Constitution]

In Attendance:

On behalf of the
President:

Mr. Mansoor Usman Awan,
Attorney-General for Pakistan assisted by
Ch. Aamir Rehman,
Additional Attorney-General,
Malik Javed Iqbal Wains,
Additional Attorney-General,
Raja M. Shafqat Abbasi,
Deputy Attorney-General and
Ms. Mariam Ali Abbasi, Advocate.

On Court Notice:

Mr. Khalid Ishaq, Advocate-General, Punjab,
assisted by Mr. Sanaullah Zahid, Addl. AG.
Mr. Hassan Akbar, Advocate-General, Sindh
assisted by Qazi M. Bashir, Addl. AG.
Mr. Amir Javed, Advocate-General,
Khyber Pakhtunkhwa, assisted by
Mr. Sultan Mazhar Sher Khan, Addl. AG.
Mr. Asif Reki, Advocate-General, Balochistan
assisted by Mr. M. Ayaz Swati, Addl. AG.

On behalf of the LRs of
the late Mr. Zulfiqar Ali
Bhutto:

Mr. Farooq H. Naek, Sr. ASC, assisted by
Messrs Iftikhar Shah and Sheraz Shaukat
Rajpar, Advocates.
(representing grandson Mr. Bilawal Bhutto Zardari)

Mian Raza Rabbani, ASC, assisted by
Mr. Zeeshan Abdullah, Advocate.
*(representing daughter Ms. Sanam Bhutto and
grandchildren Ms. Bakhtawar Bhutto and Ms.
Aseefa Bhutto)*

Mr. Zahid F. Ibrahim, ASC, assisted by
Mr. Altamash Arab, Advocate.
*(representing grandchildren Ms. Fatima Bhutto and
Mr. Zulfiqar Ali Bhutto)*

Amicus Curiae:

Mr. Manzoor Ahmad Malik,
Hon'ble former Judge,
assisted by Mr. Ansar Nawaz Mirza, ASC,
Mr. Haider Rasul Mirza, ASC and
Mr. Shahryar Riaz, Advocate High Court.

Mr. M. Makhdoom Ali Khan, Sr. ASC,
assisted by Mr. Saad Mumtaz Hashmi, ASC.

Mr. Khalid Jawed Khan, ASC.

Ch. Aitzaz Ahsan, Sr. ASC,
assisted by Ms. Zunaira Fayyaz Siwia, Adv.
and Mr. Qaiser Nawaz, Advocate.

Mr. Assadullah Khan Chamkani, ASC,
assisted by Mr. M. Tariq Khan Hoti, ASC.

Mr. Salahuddin Ahmed, ASC,
assisted by Mr. Ehsan Malik and
Mr. Aman Aftab, Advocates.

Complainant:

Mr. Ahmed Raza Khan Kasuri, ASC.
(in person)

For SCBA:

Mr. Ali Imran, ASC.

Dates of Hearing:

12.12.2023, 08.01.2024, 20.02.2024,
26.02.2024, 27.02.2024, 28.02.2024
and 04.03.2024.

Opinion

Qazi Faez Isa, CJ.

Background

1. The Federal Cabinet¹ headed by the Prime Minister decided to file a reference under Article 186 of the Constitution of the Islamic Republic of Pakistan (**'the Constitution'**) *'in respect of the proceedings of the judicial process in the case of trial Shaheed*

¹ In its meeting held on 28 March 2011.

Zulfiqar Ali Bhutto, former Prime Minister ('**Mr. Bhutto**'), and the Prime Minister advised² the President of Pakistan ('**the President**') to file the reference. Resultantly, the President submitted a reference to the Supreme Court,³ which was numbered as Reference No. 1 of 2011 ('**the Reference**').

Seeking the Opinion of the Supreme Court

2. Article 186 of the Constitution, pursuant to which the Reference was filed, states that:

'186. (1) If, at any time, the President considers that it is desirable to obtain the opinion of the Supreme Court on any question of law which he considers of public importance, he may refer the question to the Supreme Court for consideration.

(2) The Supreme Court shall consider a question so referred and report its opinion on the question to the President.'

Questions Formulated for Opinion

3. The *following questions for the opinion of the Court* were formulated:

- '1. Whether the decision of the Lahore High Court as well as the Supreme Court of Pakistan in the murder trial against Shaheed Zulfiqar Ali Bhutto meets the requirements of fundamental rights as guaranteed under Article 4, sub- Articles (1) & (2) (a), Article 8, Article 9, Article 10A/due process, Article 14, Article 25 of the Constitution of the Islamic Republic of Pakistan, 1973? If it does not, its effect and consequences?
2. Whether the conviction leading to execution of Shaheed Zulfiqar Ali Bhutto could be termed as a decision of the Supreme Court binding on all other courts being based upon or enunciating the principle of law in terms of Article 189 of the Constitution of the Islamic Republic of Pakistan, 1973? If not, its effect and consequences?
3. Whether in the peculiar circumstances of this case awarding and maintaining of the death

² On 1 April 2011, pursuant to entry 54 of Schedule V-B, Rule 15-A(1) of the Rules of Business, 1973 (enacted under Articles 90 and 99 of the Constitution of the Islamic Republic of Pakistan).

³ On 2 April 2011.

sentence was justified or it could amount to deliberate murder keeping in view the glaring bias against Shaheed Zulfiqar Ali Bhutto?

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

- (a) Sura Al-Nisa: verses 17 & 18
Sura Al-Baqara: verses 159, 160 and 222
Sura Al-Maida: verse 39
Sura Al-Aaraaf: verse 153
Sura Al-Nehal verse 119
Sura Al-Taha: verse 82

as well as

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

What are effects and consequences of doctrine
Re: Repentance

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

Larger Bench

4. The Supreme Court⁴ ordered that a larger Bench should be constituted to hear the Reference. Resultantly a larger Bench, comprising of the Chief Justice and eight Judges, was constituted, and it last heard the Reference on 12 November 2012; the Reference was not fixed in Court for eleven years. All the members of this Court who were hearing the Reference have retired.

Rehearing of the Reference

5. The Reference was again fixed in Court for hearing on 12 December 2023. This Court noted that, '*A number of other presidential references, filed later under Article 186, of the*

⁴ Before a three-Member Bench, comprising of Iftikhar Muhammad Chaudhry, CJ, Muhammad Sair Ali, J and Ghulam Rabbani, J.

Constitution, were taken up for hearing and decided by this Court,⁵ but this Presidential Reference remains pending, it merits determination as early as possible.' It would be appropriate to reproduce the following paragraphs from the order passed on 12 December 2023:

'2. Learned Mr. Farooq H. Naek referred to an application (CMA No.8622/2018) filed on behalf of Mr. Bilawal Bhutto Zardari, the grandson of the late Mr. Bhutto and states he wants to be represented herein. We are informed that there is only one surviving daughter of the late Mr. Bhutto and he has eight grandchildren. The application is allowed and learned Mr. Naek may represent Mr. Bilawal Bhutto Zardari and assist this Court. If Mr. Bhutto's daughter and any of his grandchildren also want to be represented they may engage counsel. Mr. Naek states that he has also filed an application (CMA No. 10492/2023) seeking live telecast of these proceedings, however, the committee constituted in this regard had before filing of the application already made requisite arrangements and recommended that the Presidential Reference be broadcast, and proceedings are being broadcast,⁶ therefore, this application has become infructuous and is disposed of.

3. Learned Mr. Naek refers to the report of Justice Shafi-ur-Rehman, who was then a Judge of the Lahore High Court, regarding the investigation into the murder of Mr. Mohammad Ahmed Khan, the father of the complainant, Mr. Ahmed Raza Khan Kasuri. He requested that he be provided its copy. A Tribunal of inquiry was constituted by the Government of Punjab in exercise of its powers conferred by section 3 of the West Pakistan Tribunals of Inquiry Ordinance, 1969.⁷ The *Report of the Tribunal* is dated 22 February 1975 and comprises of 30 pages, and is mentioned in the judgment of the Lahore High Court⁸ and also in the appeal therefrom.⁹

4. The learned Attorney-General for Pakistan ('AG') was asked whether any of the successive Presidents or the Federal Government sought to withdraw the Presidential Reference or wants to do so now, and the

⁵ (1) Reference No. 1 of 2012 filed on 7 December 2012, (2) Reference No. 1 of 2020 filed on 23 December 2020, (3) Reference No. 1 of 2022 filed on 21 March 2022 and (4) Reference No. 2 of 2022 filed on 18 October 2022.

⁶https://www.youtube.com/live/fnsKtf1yM78?si=Wnye57Er_IJ39zB0.

⁷ Notification No.SOG-III-6-309/74, dated 13 November 1974, published in the Punjab Gazette on 11 December 1974.

⁸*State v Zulfiqar Ali Bhutto* PLD 1978 Lahore 523.

⁹*Zulfiqar Ali Bhutto v State*, PLD 1979 Supreme Court 53, p. 61, para 9.

learned AG stated that this was not done nor is this sought to be done now.

5. Learned AG was asked to read the Presidential Reference, which he did. He also read some of the orders of this Court, including order dated 21 April 2011¹⁰ which formulated questions for the opinion of this Court. A number of *amici curiae* were appointed, some of whom have passed away and others we are told are indisposed. Learned Mr. Ali Ahmed Kurd, an *amicus* appointed by this Court, states that he will be rendering assistance. We are also informed that learned Mr. Makhdoom Ali Khan, another *amicus* appointed by this Court, will also be rendering assistance. Notice had also been issued to the Supreme Court Bar Association ('SCBA') and the late Ms. Asma Jahangir represented SCBA; if SCBA want to be represented before this Court they may nominate a counsel to assist us. We also appoint learned Messrs Khalid Javed Khan, Salahuddin Ahmed and Zahid F. Ebrahim as *amici curiae*. Mr. Yasser Kureshi, an academic working at Oxford University, United Kingdom, and Ms. Reema Omer of the International Commission of Jurists are also appointed as *amici curiae*. They are appointed to particularly attend to the constitutional and legal aspects of the matter.

6. The first and foremost constitutional and legal points, in addition to those recorded in order dated 21 April 2011, that require consideration are:

- (1) Whether the Presidential Reference is maintainable under Article 186 of the Constitution;
- (2) Whether the Presidential Reference requires a factual inquiry, and if so, whether under Article 186 of the Constitution an opinion can be given in this regard;
- (3) The constitutional-legal position of the trial and appeal, and its credibility/legitimacy when the person being tried was removed from power by a usurper who himself assumed power and then launched the prosecution of Mr. Bhutto in a criminal case which was filed as 'untraced'; and
- (4) Were certain judge(s) removed from the trial and/or hearing the appeal to secure a particular result.

¹⁰In re: Reference No. 1 of 2011, 2011 SCMR 962.

7. If the aforesaid aspect is successfully attended to then we will need to consider the trial and appeal which will require expertise in criminal law and procedure. Justice Manzoor Ahmed Malik, former Judge of the Supreme Court, and Justice Assadullah Khan Chamkani, a former Judge of the Peshawar High Court, have vast experience and we want to benefit from their knowledge in this regard, therefore, they are appointed as *amici curiae*, who may either submit a written brief and/or address us in person. We note that learned Mr. Khawaja Haris Ahmed was the Advocate-General, Punjab and was associated with the Presidential Reference when it was earlier heard and is also a criminal law expert, therefore, he is also appointed as *amicus curiae* to assist with the criminal law and procedure.

8. With regard to the criminal law aspects the learned *amici curiae* may assist on the following:

- (1) If, and when, can a murder trial be conducted by the High Court, and to cite local and international precedents;
- (2) Was the murder-trial being conducted by the High Court objected to, and if it was, how was the objection attended to;
- (3) The consequences, if any, of departing from the usual mode of trial;
- (4) The admissibility or otherwise of a confessional statement of an approver and to what extent can it be used against a co-accused;
- (5) Was there any legal bias, and if so its effects; and
- (6) What were the facts leading to reopening the investigation, and was it because fresh evidence had been discovered or was it on account of the usurper securing his position.

9. The Presidential Reference refers to an interview, which we are told was given to Mr. Iftikhar Ahmed of Geo television by Justice Nasim Hassan Shah, who was on the Bench of the Supreme Court which decided the appeal and review¹¹. Mr. Ahmed Raza Kasuri also refers to his application (CMA No. 5788/2011) and states that he has filed extracts from a book written by the same learned Judge - *Constitution, Law and*

¹¹ *Zulfikar Ali Bhutto v State*, PLD 1979 Supreme Court 741.

Pakistan Affairs. Mr. Naek states that Justice Dorab Patel had also given an interview about the case.

10. Office is directed to send copies of the Presidential Reference, all orders and the *Report of the Tribunal* to the learned *amici curiae* who may attend to the questions noted above, in order dated 21 April 2011 and in the Presidential Reference. The learned *amici* may submit their respective written opinions on all or any of the said matters, and on any other aspect which they consider relevant, by Friday, 5 January 2024.'

6. We heard this Reference on 8 January, 20, 26, 27 and 28 February and 4 March 2024. On 6 March 2024 we announced our Opinion under Article 186 of the Constitution which read as follows:

'In the course of performing our core duty to administer justice 'in accordance with the Constitution of the Islamic Republic of Pakistan and the law', we (judges) are bound to 'do right to all manner of people, according to law, without fear or favour, affection or ill-will.'¹² There have been some cases in our judicial history that created a public perception that either fear or favour deterred the performance of our duty to administer justice in accordance with the law. We must, therefore, be willing to confront our past missteps and fallibilities with humility, in the spirit of self-accountability, and as a testament to our commitment to ensure that justice shall be served with unwavering integrity and fidelity to the law. We cannot correct ourselves and progress in the right direction until we acknowledge our past mistakes.

2. The advisory jurisdiction, under Article 186 of the Constitution, requires this Court to render an opinion on any *question of law* of public importance referred to by the President. To us, the question of law, in essence, is whether the requirements of due process and fair trial were complied with in the murder trial of Mr. Zulfikar Ali Bhutto ("Mr. Bhutto"), the former Prime Minister of Pakistan, by the trial court (the Lahore High Court) and the appellate court (the Supreme Court). This question we approach and answer considering whether the trial court and the appellate court attended to and dealt with the requirements of due process and fair trial.

¹² Oath of Office for Judges of the Supreme Court and the High Courts, prescribed under Articles 178 and 194 in the Third Schedule to the Constitution of the Islamic Republic of Pakistan.

3. The reference filed by the President of Pakistan has provided us an opportunity to reflect upon the proceedings of the trial, conviction and death sentence of Mr. Bhutto, under the regime of the military dictator General Zia Ul Haq. The reference was filed during the government of the political party founded by Mr. Bhutto but the successive governments of other major political parties carried forward this inquiry and did not opt to withdraw the reference. This collective interest reflects the widespread desire of the people of Pakistan to seek the opinion of this Court on whether Mr. Bhutto was afforded a fair trial and due process for his trial for the murder of Mr. Muhammad Ahmed Khan Kasuri.

4. With the able assistance of the eminent legal minds of the country, we for the reasons to be recorded later and subject to amplifications and explanations made therein, render an opinion on the referred questions in the following terms:

Question (1)

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

Opinion

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

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

Question (2)

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

Opinion

Referenced questions do not specify the principle of law enunciated by this Court in the *Zulfiqar Ali Bhutto* case regarding which our opinion is sought. Therefore, it cannot be answered whether any principle of law enunciated in the *Zulfiqar Ali Bhutto* case has already been dissented to or overruled.

Questions (3) and (5)

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

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

Opinion

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

Question (4)

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

(a) Sura Al-Nisa, verses 17 and 18; Sura Al-Baqara, verses 159, 160 and 222; Sura Al-Maida, verse 39; Sura Al-Aaraaf, verse 153; Sura Al-Nahl, verse 119; Sura Al-Taha, verse 82; as well as (b) Sunan Ibn-e-Maaja, Chapter 171, Hadith No. 395.

What are effects and consequences of doctrine – Re: Repentance

Opinion

We were not rendered any assistance on this question, therefore, it would be inappropriate to render an opinion.'

Retirement of Senior Puisne Judge Sardar Tariq Masood

7. Sardar Tariq Masood, J was the senior puisne judge when the Reference was heard and the above opinion was rendered, however, he retired on 10 March 2024. It is commonsensical that, if a Judge has already signed a written opinion/short order, but then retires, he can sign/give the detailed reasons post-retirement. This also prevents the unnecessary wastage of public resources and Court time, which would happen if the Bench was to be reconstituted (after the retirement of a Judge) and the entire matter heard again. A Supreme Court Bench comprising of thirteen Judges¹³ held that Judges who had retired before signing the detailed reasons could do so after their retirement.

Facts of the case

8. On 11 November 1974 at 12.30 am Mr. Muhammad Ahmad Khan ('**Mr. Khan**'), his wife, his wife's sister and his son Mr. Ahmad Raza Kasuri ('**Mr. Kasuri**') were returning home after having attended a wedding in a car driven by Mr. Kasuri when it was fired upon and a bullet struck Mr. Khan in the head, which resulted in his death. The FIR¹⁴ was registered on the written complaint of Mr. Kasuri ('**the Complainant**'), who stated that he

¹³ *Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v President of Pakistan*, PLD 2016 Supreme Court 61, para 206, pp. 203-4.

¹⁴ First Information Report No. 402/74 was registered at Police Station Ichhra, Lahore on 11 November 1974 at 3.45 am under section 302 (murder, now *qatl-i-amd*) and under section 307 (now section 324) – attempt to kill - of the Pakistan Penal Code, 1860.

suspected that he (and not his father) was the intended target because he was vociferously opposed to the *government party* (Pakistan Peoples Party) of Mr. Bhutto. Attributing motive to Mr. Bhutto, he stated that Mr. Bhutto had addressed him in the National Assembly (of which both were members – MNAs) saying that he (Mr. Kasuri) had exhausted his patience (‘برداشت سے باہر ہو چکا ہے’) and that he (Mr. Bhutto) had said that he had had enough of Mr. Kasuri (‘میں اس شخص سے تنگ آچکا ہوں’).

Police Investigation of the Crime

9. The Police commenced its investigation¹⁵ of the crime but the perpetrators could not be unearthed. Therefore, the Senior Superintendent of Police (‘SSP’) transferred the investigation to a specialized investigation unit, that is, to the Crime Investigation Agency (‘CIA’).¹⁶ However, the CIA also failed to trace the criminals, and after nine and a half months submitted its report recommending the closure of the investigation.¹⁷

Closing the Investigation

10. The Police could not make any progress in discovering those who had committed the crime which had killed Mr. Khan. The CIA too drew a blank. Therefore, a report was prepared by Inspector Abdul Hameed of CIA, Lahore which was also signed on 19 March 1976 by the Deputy Superintendent of Police (‘DSP’), Ichhra Circle, Lahore within the limits of which the crime was committed, and on 24 April 1976 by the Superintendent of Police (‘SP’), Cantonment, Lahore, recommending that the investigation be closed. The Magistrate ordered the closure of the investigation on 3 May 1976. Neither Mr. Kasuri, nor the other legal heirs of the late Mr. Khan, nor anyone else objected to the closure of the

¹⁵ The investigation commenced on 11 November 1974 by Sub Inspector Abdul Hayee, who was the Station House Officer (SHO) of Police Station Ichhra, and continued till 14 December 1974.

¹⁶ CIA’s Inspector Abdul Hameed took over the investigation on 15 December 1974.

¹⁷ The closure report dated 1 October 1975 was prepared and submitted under rule 25.57 of the Police Rules, 1937, read with section 173 of the Code of Criminal Procedure, 1898.

investigation. The Magistrate's order closing the investigation was never challenged.

Tribunal of Inquiry

11. The Government of Punjab appointed a Judge of the Lahore High Court as the Tribunal¹⁸ to inquire into:

'NOTIFICATION The 13th November 1974

No. SOG-III-6-309/74 - Whereas the Government of the Punjab is of the opinion that it is necessary to appoint a Tribunal for the purpose of making an inquiry into the incident which took place at Shadman-Shah Jamal Round-about, nearly four furlongs to the north of P. S. Ichhra, Lahore on the night between 10th and 11th November, 1974 at 12-30 a.m. (night):

Now, therefore, in exercise of the powers conferred on him by Section 3 of the West Pakistan Tribunals of Inquiry Ordinance, 1969 (Ordinance II of 1969), the Governor of the Punjab is pleased to appoint Mr. Justice Shafi-ur-Rehman, Judge, Lahore High Court as the Tribunal.

2. The terms of reference of the Tribunal shall be-

- (i) To inquire into the incident which took place on the night between 10th and 11th November, 1974 at Shadman-Shah Jamal Round-about, nearly four furlongs to the north of P. S. Ichhra, Lahore leading to the death of Nawabzada Muhammad Ahmed Khan, resident of 130-J, Model Town, Lahore, father of Mr. Ahmed Raza Khan Qasuri, MNA, in which connection FIR No. 402/74 was recorded on 11th November 1974 at P. S. Ichhra, Lahore
- (ii) To examine the investigations conducted by the Police in the case and give such directions as may be appropriate.

3. The Tribunal will finalize the inquiry and submit his report within one month.

F. K. BANDIAL
Chief Secretary.'

¹⁸ Inquiry Tribunal comprising of Justice Shafi-ur-Rehman was constituted under the West Pakistan Tribunals of Inquiry Ordinance, 1969 *vide* Notification No.SOG-III-6-309/74, dated 13 November 1974, published in the Punjab Gazette on 11 December 1974.

12. The Tribunal submitted *Report of the Tribunal* on 22 February 1975, which found that:

'15. The only motive mentioned in the FIR accounting for the occurrence is the affiliations and the political activities of the complainant, Mr. Ahmed Reza Khan Kasuri, and the extreme exasperation and dislike for him of the Prime Minister publicly expressed on the floor of the National Assembly. In explaining the mention of such a motive in the FIR the complainant made it clear that it does not necessarily mean that he was subjected to this and the precedent attacks directly at the bidding of the Prime Minister or that the attack was organized by someone in Government or Party. He said that on political differences, whatever their nature or extent, such a public condemnation by the Prime Minister, who happens to be, for the time being, the repository and source of all political and governmental powers, could prompt a die-hard, an over enthusiastic person, or a trigger happy individual, in the government or outside, of the party or not, to accomplish his extermination from the scene.'

The Tribunal issued the following directions:

'36. In short, the directions that I propose giving to the investigating agency are the following:-

- (i) A more thorough and expert examination of the spot.
- (ii) Preservation of property connected with the crime, already recovered or recoverable from the spot.
- (iii) Expert examination of all the recovered articles together, with a view to narrow down the class of weapon used in the commission of the crime.
- (iv) Natural witnesses to the occurrence i.e. residents of the area, invitees at the house of Bashir Shah, the Patrol Parties to be subjected to more purposive interrogation particularly for ascertaining the number of shots fired, number of weapons used and the suspects.
- (v) The surviving occupants of the car should have been profitably interrogated on certain aspects of the investigation.

- (vi) The material witnesses in the case and the suspects to be fully protected against physical harm.'

However, nothing was unearthed about the perpetrator(s) of the crime.

5 July 1977

13. The Chief of Army Staff, General Mohammad Zia-ul-Haq, overthrew the democratic order and imposed martial law on 5 July 1977. The investigation of the murder of Mr. Khan on 11 November 1974, which was closed on 3 May 1976, was reopened on the verbal orders of the Director of the Federal Investigation Agency ('FIA').¹⁹ The prosecution never explained how and why an investigation into a thirty-two month old case, which was closed fourteen months earlier, was reopened. It was also not explained how and why the investigation was transferred to the FIA. Both of these actions (the reopening of the investigation and its transfer to FIA) were taken immediately after General Zia-ul-Haq's coup d'etat overthrowing Mr. Bhutto's government. The case was resurrected.²⁰

Post Coup Investigation

14. The interim investigation report (*challan*) was submitted on 11 September 1977.²¹ In addition to section 302 (murder) of the Pakistan Penal Code, 1860 ('PPC') and section 307 (attempt to murder) mentioned in the FIR were added, sections 120B (criminal conspiracy to commit an offence) and 109 (abetment of an offence). The following seven persons were nominated in the interim investigation report to having conspired to murder Mr. Kasuri and for the murder of Mr. Khan:

Mr. Bhutto, Prime Minister

(Sheikh) Masood Mahmood, Director-General FSF

Mian Muhammad Abbas, Director FSF

¹⁹ As per the testimony of Abdul Khaliq, Deputy Director FIA (PW 41).

²⁰ The first entry in the case diary (*zimni*) by FIA is recorded by Abdul Khaliq, Deputy Director FIA, on 24 July 1977, though the file of the case was received by Inspector FIA Muhammad Boota on 8 August 1977.

²¹ Section 173 of the Code of Criminal Procedure, 1898.

Mr. Ghulam Hussain, Inspector FSF

Mr. Ghulam Mustafa, Inspector FSF

Mr. Arshad Iqbal, Sub Inspector FSF

(Rana) Iftikhar Ahmad, Assistant Sub Inspector FSF

However, in the final investigation report (*challan*) dated 18 September 1977 Masood Mahmood and Mian Muhammad Abbas were shown as approvers.

Transfer of case to the Lahore High Court

15. A murder case under section 302 PPC can only be tried by a Court of Session. Therefore, the investigation report, which was submitted to the Magistrate, was forwarded to the Sessions Judge, Lahore on 12 September 1977. After receipt of the report the trial would have commenced. However, on the very next day (13 September 1977) the case (Criminal Original No.60/77, titled *State v Z. A. Bhutto*) came up before Justice Mushtaq Hussain, the Acting Chief Justice ('**ACJ**'), who the very same day ordered that, '*In view of submissions made in the petition the case is transferred to this Court for trial.*' This was done despite the fact that the Sessions Judge, Lahore had already on 12 September 1977 taken cognizance of the case. It is inexplicable how then the case was listed for hearing before the ACJ. Criminal Original No.60/77 is untraceable, therefore, it cannot be ascertained what was recorded therein, and what had necessitated its immediate fixation in the High Court, and before Justice Mushtaq Hussain. The record (which is available), however, shows that Justice Mushtaq Hussain immediately and on the same day 13 September 1977 granted the said petition, by passing the following order:

'In view of the submissions made in the petition the case is transferred to this Court for trial. It shall be heard by a Full Bench consisting of

1. Myself
2. Zakiuddin Pal
3. M.S.H. Qureshi
4. Sheikh Aftab Hussain and
5. Malik Gulbaz Khan, JJ.

To be heard on 24.9.1977.

Maulvi Mushtaq Hussain
ACTING CHIEF JUSTICE'

Commencement of the Trial

16. On 24 September 1977 the trial of Mr. Bhutto and of the other co-accused commenced. The High Court ordered that the *evidence be summoned*, however, even though the accused were present in Court, the *charge* was not framed against them. The *charge* was also not framed on the next date, that is, on 3 October 1977. Framing of charge is a mandatory requirement,²² and only after it is framed can a trial commence. The charge was finally framed on 11 October 1977 when all the accused pleaded *not guilty*. From 11 October 1977 to 25 February 1978 the High Court (acting as the Trial Court) recorded the statements of forty-one prosecution witnesses (PWs) and of four defence witnesses (DWs). On 2 March 1978 judgment was reserved and it was announced on 18 March 1978. Mr. Bhutto was convicted for the following offences of the PPC: (a) section 120-B and sentenced to five years rigorous imprisonment, (b) section 302 read with sections 301 and 111 and sentenced to death and (c) under section 307 read with section 109 and sentenced to seven years rigorous imprisonment for each offence.

Appeal and Review

17. Mr. Bhutto appealed his conviction before the Supreme Court,²³ but his appeal was dismissed on 6 February 1979 by a majority of four to three.²⁴ A review petition²⁵ seeking review of the Judgment dismissing Mr. Bhutto's criminal appeal was filed, but it was unanimously dismissed on 24 March 1979.

²² Section 265-D of the Code of Criminal Procedure, 1898.

²³ Criminal Appeal No. 11 of 1978.

²⁴ S. Anwarul Haq, CJ, Muhammad Akram, Karam Elahi Chauhan and Nasim Hassan Shah, JJ, dismissing the appeal, while Dorab Patel, Muhammad Haleem and G. Safdar Shah, JJ, allowing it.

²⁵ Review Petition No. 5/R of 1979.

Death Warrant and Execution

18. Mr. Bhutto's '*Warrant of Execution on Sentence of Death*' (**'the death warrant'**) was signed by Mushtaq Hussain, J, who by now had become the Chief Justice of the Lahore High Court. The death warrant concluded in the following words: '*Given under my hand and the seal of the Court this 25th day of March 1979*', and it directed the Superintendent District Jail at Rawalpindi to execute the sentence on '*the Second day of April 1979*'. The execution date was later changed to '*the Fourth day of April 1979*'. Mr. Bhutto was executed and the Superintendent District Jail Rawalpindi issued a certificate stating that he was '*hanged by the neck till he was dead at Rawalpindi on Wednesday the 4th day of April, 1979; that the body remained suspended for a full hour and was not taken down until life was ascertained by a medical officer to be extinct...*'.

The Constitutional scope of this matter

19. We want to clarify, and emphasize, that we are not hearing a petition, an appeal or a review petition. Neither the Constitution nor the law provides a mechanism whereby Mr. Bhutto's conviction could be set aside. Mr. Bhutto's conviction attained finality after the dismissal of the review petition by the Supreme Court. In our advisory jurisdiction, under Article 186 of the Constitution, the decision cannot be undone.

Detailed Reasons

20. With regard to the conviction and sentence of Mr. Bhutto, on 6 March 2024 we had recorded that, '*in our detailed reasons, we shall identify the major constitutional and legal lapses that had occurred with respect to fair trial and due process*'. The following are the detailed reasons.

Reopening of the Investigation

21. The investigation of the murderous attack that took place on 11 November 1974 was undertaken by the Police, however, as no progress could be made it was transferred to the CIA, but still the perpetrator(s) could not be discovered. A Tribunal comprising of a High Court Judge was then constituted who issued certain

directions but it did not help in unearthing the criminal(s). The recommendation to close the investigation was then made, which was accepted by the Magistrate and the investigation was officially closed on 3 May 1976. No one objected to the closure of the investigation. No application was submitted to reopen the investigation, and no Court ordered that the investigation be reopened. The complainant, who was a lawyer of some standing, also did not object to the closure of the investigation nor did he take the objection that its closure was premature.

22. Within a few days of General Zia's take over those, who were made the accused, were arrested, the crime, which was declared to be untraced and the investigation of which had been closed, was reopened (without authorization) and FIA re-investigated it (without aurtORIZATION). Everyone who was made a co-accused with Mr. Bhutto had surprisingly confessed to the crime. And, the High Court unilaterally and without hearing the accused elected to itself conduct a murder trial, which was wholly unprecedented. Mr. Bhutto had appointed General Zia-ul-Haq as the Army Chief²⁶ who by his actions of 5 July 1977 had clearly violated Article 6 of the Constitution and committed the offence of high treason, the prescribed punishment for which is imprisonment for life or death. General Zia, therefore had a motive to proceed against Mr. Bhutto, because had he not done so, Mr. Bhutto may have proceeded against him for committing high treason.

Reinvestigation by FIA

23. The Federal Investigation Agency Act, 1974 (**'the FIA Act'**) constituted the FIA, and empowered the FIA to investigate the offences listed in the Schedule to the FIA Act, but it does not permit the reinvestigation of a crime which has already been investigated by the Police and the investigation whereof was ordered to be closed. Significantly, no judicial order was issued directing that the investigation be reopened or the crime reinvestigated by the FIA. The FIA had received the case file on 8

²⁶ On 1 March 1976.

August 1977, but it had already commenced *reinvestigation* on 24 July 1977, as per case diary recorded by Abdul Khaliq, Deputy Director, FIA. This suggests that there was a preconceived objective. This transgression escaped the attention of the Trial Court Judges and also of the majority of the Appellate Court Judges.

Transfer of Case to the High Court

24. The reinvestigation report was submitted to the Sessions Judge, Lahore²⁷ on 12 September 1977 who sought a report from the Public Prosecutor. However, the very next day (on 13 September 1977) the case was placed before a single Judge of the Lahore High Court, namely, Justice Mushtaq Hussain, who did something most unusual. Without issuing notices to Mr. Bhutto and to the other accused, without providing them an opportunity of a hearing and without enabling them to acquire legal representation, he ordered that, *'In view of the submissions made in the petition the case is transferred to this Court for trial.'*

25. Section 526 of the Code of Criminal Procedure, 1898 (**'the Code'**) empowers the High Court to transfer a criminal case to itself if: (a) a *fair trial* is not possible, (b) the case involves *some questions of law of unusual difficulty*, (c) if the *place in or near which any offence has been committed* needs to be viewed, (d) it will be *to the general convenience of the parties or witnesses* or (e) to secure the *ends of justice*. However, Justice Mushtaq Hussain, ACJ did not cite any reason, let alone any of those mentioned in the law necessitating the transfer of case to the High Court and for it to conduct the trial itself.

Prejudice Caused to the Accused/Convict

26. A murder trial is conducted by a Court of Session.²⁸ Appeal against conviction lies before the High Court.²⁹ Article 185(2)(b) of the Constitution and sections 411-A and 526 of the Code permit

²⁷ Code of Criminal Procedure, 1898, section 190(2) read with section 346(2).

²⁸ *Ibid.*, sections 190(2) and 265-A.

²⁹ *Ibid.*, section 410.

trials to be conducted by the High Court, but these provisions do not provide for a High Court to conduct a murder trial. There was not a single precedent of a High Court conducting a murder trial. Mr. Bhutto's murder trial by the High Court made history; never before nor since has this happened. In other countries of the Indian subcontinent, where there are similar legal provisions, a High Court has never conducted a murder trial.

27. By conducting the murder trial itself, the High Court made redundant a number of provisions of the Constitution and Chapter XXVII of the Code. Section 374 requires that every sentence of death is required to be confirmed by the High Court; a vitally important safeguard against faulty convictions and hasty hangings. The sentence of death which is confirmed by the High Court must also be signed by two judges.³⁰ When a sentence of death is passed, the High Court to which the matter is sent for confirmation of the conviction and sentence is also empowered to *pass any other sentence warranted by law or acquit the accused person*.³¹ In this case the trial was conducted by the High Court as the Trial Court, therefore, the death sentences passed by the Trial Court had to be confirmed by the Appellate Court. The mandatory requirement of section 376 of the Code, reproduced hereunder, was not complied with:

'Power of High Court to confirm sentences or annul conviction: In any case submitted under Section 374 the High Court:

- (a) may confirm the sentence, or pass any other sentence warranted by law; or
- (b) may annul the conviction and convict the accused of any offence of which the Sessions Court might have convicted him or order a new trial on the same or an amended charge; or
- (c) may acquit the accused person;

Provided that no order of confirmation shall be made under this section until the period allowed for

³⁰ *Ibid.*, section 377.

³¹ *Ibid.*, section 376.

preferring an appeal has expired, or, if an appeal is presented within such period, until such appeal is disposed of.'

28. If for argument's sake it be accepted that the High Court could have conducted a murder trial, this it then did as a Trial Court, and as death sentences were passed these had to be confirmed by submitting the case to the High Court. Any two Judges of the High Court, who had not conducted the trial, could have done so in terms of section 376 of the Code. But, this was not done. Without confirming the sentences of death they could not have been executed. The Code, and its section 376, which provides essential protection to those sentenced to death, was enacted in 1898, but this provision has only once been disregarded, which was in this case.

Constitutional Safeguards were Disregarded

29. The Constitution mandates that, '*To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen.*'³² And, '*In particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law.*'³³ The law (section 376 of the Code) requiring the confirmation of death sentences was violated and this *inalienable right* was contravened. Article 9 of the Constitution stipulates that, '*No person shall be deprived of life or liberty save in accordance with law,*' and this fundamental right too was violated, regrettably, by those mandated to ensure the laws compliance.

Right of appeal lost

30. An appeal against the conviction and sentence of a Court of Session lies to the High Court.³⁴ However, since the trial was conducted by the High Court itself, Mr. Bhutto and the other accused were deprived of one right of appeal. Article 4(1) of the Constitution which requires that all be treated *in accordance with law*, and Article 9 of the Constitution which prohibits anyone to be

³² Constitution of the Islamic Republic of Pakistan, Article 4(1).

³³ *Ibid*, Article 4(2) (a).

³⁴ Code of Criminal Procedure, 1898, section 410.

deprived of life save in accordance with law were vitiated. The convicts were deprived of one right of appeal, which Articles 4(1) and 9 guaranteed, and these rights can not be undone or disregarded, even during the proclamation of emergency.³⁵

Right to Fair Trial and Due Process

31. The right to due process and a fair trial is part of the jurisprudence of Pakistan. These rights subsisted even before '*the right to fair trial and due process*' were specifically incorporated in the Constitution, through Article 10A in the year 2010 as *Fundamental Rights*.³⁶ In the case of *Abul A'la Moudoodi v Government of West Pakistan*³⁷ a five-Member Bench of the Supreme Court had stated (in 1964) that the necessity of *due process* '*is an element of justice which forms part of the British Common Law*', that is inherited by Pakistan. In the case of *Benazir Bhutto v Federation of Pakistan*³⁸ (1988) the Fundamental Right to life (Article 9 of the Constitution) was held, by an eleven-Member Bench of the Supreme Court, to include *access to justice*, which incorporates *fair trial* and *due process*:

'The right of "access to justice to all" is a well-recognised inviolable right enshrined in Article 9 of the Constitution. This right is equally found in the doctrine of "due process of law". The right of access to justice includes the right to be treated according to law, the right to have a fair and proper trial and a right to have an impartial Court or Tribunal. This conclusion finds support from the observation of Willoughby in Constitution of United States, Second Edition, Vol. II at page 1709 where the term "due process of law" has been summarised as follows:

- "(1) He shall have due notice of proceedings which affect his rights.
- (2) He shall be given reasonable opportunity to defend.
- (3) That the Tribunal or Court before which his rights are adjudicated is so constituted as to give

³⁵ Constitution of the Islamic Republic of Pakistan, Part X.

³⁶ Article 10A was inserted by the Constitution (Eighteenth Amendment) Act, 2010.

³⁷ PLD 1964 Supreme Court 673, p. 710.

³⁸ PLD 1988 Supreme Court 416.

reasonable assurance of his honesty and impartiality, and

(4) That it is a Court of competent jurisdiction."

It therefore follows that in terms of Article 9 of the Constitution a person is entitled to have an impartial Court and tribunal. Unless an impartial and independent Court is established the right to have a fair trial according to law cannot be achieved.'

The above principle was reiterated (in 1993) in the case of *Government of Balochistan v Azizullah Memon*:³⁹

'The right of access to justice is internationally well-recognised human right and is now being implemented and executed by granting relief under the Constitutional provisions. Article 10 of Universal Declaration of Human Rights and Article 14 of the United Nations Convention on Criminal Political Rights⁴⁰ recognize the right of fair trial by an independent and impartial Tribunal established by law.'

'The right of access to justice does not only mean that the law may provide remedies for the violation of rights, but it also means that every citizen should have equal opportunity and right to approach the Courts without any discrimination. It also envisages that normally the Courts established by law shall be open for all citizens alike. Where the jurisdiction of the ordinary Courts established under the ordinary law is excluded or barred and certain class of cases or class of persons or inhabitants of an area are not allowed to approach such Courts and are to be tried or rights adjudicated by special Courts, then a fair, rational and reasonable classification must be made which have nexus with the object of the legislation.'

*Al-Jehad Trust v Federation of Pakistan*⁴¹ was decided by a five-Member Bench (in 1996) and it reiterated the earlier (1994) decision in the case of *Government of Sindh v Sharaf Faridi*,⁴² in which the *due process of law* requirement had been stressed.⁴³

³⁹ PLD 1993 Supreme Court 341.

⁴⁰ Incorrectly mentioned, as it is the *International Covenant on Civil and Political Rights*.

⁴¹ PLD 1996 Supreme Court 324.

⁴² PLD 1994 Supreme Court 105.

⁴³ PLD 1996 Supreme Court 324, p. 423YY.

In the above mentioned cases, and in many others recording similar opinions, the jurisprudence of *fair trial and due process* stood established as a fundamental right well before the insertion of Article 10A⁴⁴ in the Constitution in 2010. The safeguards to ensure that an accused is fairly and justly treated and that essential requirements of a fair trial and due process are met were disregarded in the case of Mr. Bhutto.

Basis of Conviction

32. The foremost basis for the conviction of Mr. Bhutto was the testimony of an accused, who turned approver, namely, (Sheikh) Masood Mahmood, the then Director-General of the Federal Security Force ('**FSF**'). After the coup d'état of 5 July 1977 Masood Mahmood was arrested, nominated as an accused and pleaded that he would make disclosure of the crime, provided he is pardoned. His plea was accepted and he was made an approver.⁴⁵

Masood Mahmood the Approver

33. After Masood Mahmood's arrest he wrote to the District Magistrate, Lahore on 7 September 1977, stating he had, '*simply carried out orders of the former Prime Minister of Pakistan, Mr. Zulfikar Ali Bhutto, to cause the death of Mr. Ahmad Raza Kasuri.*' And, '*in case I am granted pardon... I would be able to disclose material facts regarding the conspiracy leading to the murder...*'. He did so because, to use his own words, '*the commission of this heinous crime has haunted my conscience.*' Incarceration had revived his flagging conscience. The crime was committed three years earlier and Masood Mahmood's conscience remained dormant and only awoke when he was arrested. A conscience which first wanted to secure a pardon for himself. A conscience which considered that to order an assassination was '*simply*' a matter of '*carrying out orders*', as was stated by this most senior police officer. The Additional District Magistrate accepted Masood

⁴⁴ Article 10A was inserted by the Constitution (Eighteenth Amendment) Act, 2010.

⁴⁵ Under section 337 of the Code of Criminal Procedure, 1898.

Mahmood's plea on 14 September 1977, seven days after he had written to him offering *'to disclose material facts.'*

Statement of Masood Mahmood

34. Masood Mahmood was made an approver on 14 September 1977, and his statement was recorded the same day. He waxed eloquent and most of what he said was irrelevant. The first four pages mention the various positions that he had held and how he reached grade 21. *'My selection to the Indian Police was made against a war reserved vacancy as I had served briefly in the Royal Indian Air Force.'* And, *'I resumed duty on 18th September 1948 as Assistant Superintendent Police.'* This was followed by saying that Prime Minister Mr. Bhutto had sent for him on 12 April 1974, had praised him and noted the *'good work'* he had done and acknowledged his *'established reputation for integrity, honesty and hard work.'* It is questionable whether *integrity* and *honesty* would be the qualities to look for in a henchman. Masood Mahmood stated that after an hour of Mr. Bhutto persuading him he condescended to *'take-over as D.G. (FSF) to re-organise and train the force.'* He then proceeded to reveal his vulnerability, stating that his *ex-colleague* Saeed Ahmad Khan, Chief Security Officer of the Prime Minister, and his Assistant, Abdul Hamid Bajwa, told him that if he did not do as Mr. Bhutto asked, *'your wife and children may see no more of you.'* Saeed Ahmed Khan was not produced as a witness and Abdul Hamid Bajwa had died, therefore, anything allegedly said by them constituted hearsay. Masood Mahmood then disclosed his cowardice, stating that Mr. Bhutto had told him, *'You do not want Waqar chasing you...?'* Waqar was also not produced as a witness. Another name which Masood Mahmood dropped was of M. R. Welch, Director FSF in Quetta, who he *'instructed to take care of him [Mr. Kasuri] if possible in Quetta'*. Masood Mahmood stated *'that Mian Abbas had previously been asked under his orders through Mr. Haq Nawaz Tiwana do away with Ahmad Raza Kasuri. He directed me to tell Mian Abbas to get on with the job and tell Mian Abbas to produce either Ahmad Raza Kasuri's dead-body or his body totally*

bandaged all over.' Mian Muhammad Abbas, however, retracted his statement before the Trial Court and Haq Nawaz Tiwana, the previous Director-General of FSF, was not produced to testify. Masood Mahmood stated that Mr. Bhutto had wanted Mr. Kasuri to be killed for quite some time and had already directed Mian Abbas to do so, but to no effect. However, only when Masood Mahmood directed him to do so was Mr. Kasuri fired upon, which instead killed Mr. Khan.

Masood Mahmood Defiance of the Prohibition to Kill

35. Masood Mahmood put himself forward as a man having faith (ایمان) in God and knew that ordering someone's murder was '*against the dictates of God*', but since he was given '*specific orders*' from Mr. Bhutto he became '*instrumental in defying God Almighty (May He forgive me) for taking a valuable human life.*' The reason cited by Masood Mahmood for defying God was his marital status – '*I would have chucked the job and walked down on the street, had I been a bachelor.*'

Masood Mahmood's Credibility

36. Masood Mahmood's credibility was accepted and he was believed without demur by the Trial and Appellate Courts. However, there were a number of factors which prudence should have alerted and shown that he was self-serving, self-preserving, morally bankrupt, and a false witness:

- (1) Masood Mahmood testified that Mr. Bhutto had appointed him as the Director General of FSF because of his *integrity* and *honesty*, but would those be the qualities that would be sought in one appointed to fulfill a criminal agenda and carry out nefarious activities.
- (2) Masood Mahmood stated that '*his father and the deceased were great friends*' yet he had no qualms to order the assassination of the son of his father's *great friend*.

- (3) Mr. Bhutto had already instructed Mian Muhammad Abbas to assassinate Mr. Kasuri, according to Masood Mahmood, therefore, it is inexplicable why he would then also tell Masood Mahmood to do so.
- (4) Masood Mahmood stated that Mian Muhammad Abbas did not follow Mr. Bhutto's directions to kill Mr. Kasuri, but offered no explanation why he disobeyed and suffered no consequences for such disobedience.
- (5) However, Masood Mahmood's orders were followed by Mian Muhammad Abbas, who had earlier disobeyed the Prime Minister.
- (6) As stated by Masood Mahmood it was acceptable to Mr. Bhutto if Mr. Kasuri was given a thorough beating yet he directed that Mr. Kasuri be killed.
- (7) In ordering an assassination, and not a beating, Masood Mahmood alone would be responsible for it.
- (8) Masood Mahmood stated that the following were complicit and were informed about the conspiracy to kill Mr. Kasuri: (1) Haq Nawaz Tiwana, the first Director-General of FSF, (2) Mian Muhammad Abbas, Director FSF, (3) M. R. Welch, Director FSF, Quetta, (4) Saeed Ahmed Khan, Prime Minister's Chief Security Officer, (5) Abdul Hamid Bajwa, Assistant Chief Security Officer and (6) himself. This number of persons knowing about a heinous conspiracy showed complete recklessness and disregard of detection, which any reasonable person would find hard to accept.
- (9) The conspiracy theory put forward by Masood Mahmood was believed without a shred of supporting evidence.
- (10) After Mr. Khan's murder Masood Mahmood continued to hold the position of DG of FSF, however, he was never again asked by Mr. Bhutto to do anything nefarious, let alone to kill. Did this mean that Mr. Bhutto had only one enemy, and the FSF comprising

of thousands of personnel, was established for this sole purpose.

- (11) Masood Mahmood secured his freedom and a passage out of the country by sacrificing Mr. Bhutto. A prudent person would be alerted to the conduct of such a person, yet Masood Mahmood's credibility was not questioned by those whose judicial duty it was to satisfy themselves of it.

Conscience and Convenience

37. Masood Mahmood repeatedly referred to his *conscience*. 'My conscience haunted me' and 'that this action [murder] would be against my conscience.' However, his *conscience*, lay dormant throughout his tenure as the Director-General of the FSF; it surfaced when he had spent only a few days in custody, and, his resurgent conscience was premised on first extricating himself and securing for himself a pardon. His convenience and safety trumped his conscience, which begs the question, was he truthful or an opportunist? Confessions must be voluntary and must not have 'been obtained from him by fear of prejudice or hope or advantage'.⁴⁶ And, 'If the confession directly or indirectly is the result of inducement, threat or promise from a person in authority, it would be treated as not voluntary'.⁴⁷ It must be 'ensure[d] that the confessional statement should be absolutely free from the slightest tinge or taint of extraneous influence such as threat, promise or inducement and the Courts are placed under an obligation to affirmatively satisfy themselves that it is free and voluntary'.⁴⁸ Masood Mahmood obtained for himself freedom from captivity by his self-serving statement. Masood Mahmood melodramatically put forward his faith by overlooking Islam's most fundamental teaching, and prohibition: to kill a human, and that killing one person was like the killing of all of humanity and saving one person was like the saving of all of humanity.⁴⁹ This type of person

⁴⁶ *Ibrahim v King*, (1975) 3 ALLER 175.

⁴⁷ *Muhammad Amjad v State*, PLD 2003 Supreme Court 704, 717.

⁴⁸ *Dhani Bakhsh v State*, PLD 1975 Supreme Court 187, 191B.

⁴⁹ *Al-Qur'an*, surat *Al-Maidah* (5) verse 32.

the Federal Court had perceptively categorized as '*a moral wretch*'.⁵⁰

Lack of Evidence

38. With regard to the three offences attracting death sentences, section 302 (murder), section 307 (attempted murder) and section 111 (abetment), there was no direct evidence against Mr. Bhutto, there wasn't even circumstantial evidence, which would exclude any reasonable hypothesis of innocence. The entire prosecution case was built on the statements of Masood Mahmood and Mian Muhammad Abbas, however, Mian Muhammad Abbas retracted his confession and testified to the contrary. Haq Nawaz Tiwana and Abdul Hamid Bajwa had died. M. R. Welch and Saeed Ahmed Khan, without being made approvers, were produced as prosecution witnesses.

Negative Forensic Report

39. The spent bullet casings, ejected from the firearm(s) that were used in the attack, did not match any of the weapons in use of the FSF. The prosecution contended that they were substituted, but without producing any positive evidence to substantiate this. Nonetheless, this contention of the prosecution was accepted, and it was further presumed that the purported substitution was done at the behest of Mr. Bhutto.

Unsubstantiated Inferences

40. Certain notings in some file/document, statedly made by Abdul Ahad, DSP, and Abdul Hamid Bajwa (exhibits 3/2-A and 3/2-A/1), were brought on record. And, Mr. Bhutto was sought to be implicated by relying on them purely on the basis of assumptions and his '*subsequent conduct*', without stating what this was and how it incriminated him. The Trial Court held that, '*These documents corroborate the evidence of these witnesses on this point,*' but without stating the said *point*. The judgment follows this with another vague sentence – '*These documents further show*

⁵⁰ *Ishaq v Crown*, PLD 1954 Federal Court 335, 343.

that the principal accused as well as P.W.3 agreed to this suggestion', without expounding on what was *this suggestion* and to what had they *agreed*. Neither Abdul Ahad nor Abdul Hamid Bajwa were produced as witnesses (Abdul Hamid Bajwa had died), therefore, they could not be subjected to cross-examination. Extraordinary effort was made to draw arbitrary connections, derive meanings therefrom and then use them against the accused. This eroded the fundamental principle of establishing guilt *beyond reasonable doubt*. The manner in which the trial was conducted was antithetical to a fair trial and due process.

Motive - Corroboration

41. Section 114 of the Evidence Act, 1872⁵¹ in its illustration (b) states, '*that an accomplice is unworthy of credit, unless he is corroborated in material particulars.*' In criminal jurisprudence it is well settled that motive cannot corroborate an approver's testimony.⁵² However, the Trial Court was of the opinion that *motive* could be used as corroboration as expressed in paragraph 584 of its judgment, comprising of 627 paragraphs. Respectfully, it was also incorrect to say that, '*The principle laid down is not so wide*', which was in complete negation of the said statutory provision. Only in paragraph 584 of the judgment was there a fleeting reference to *motive* yet the Trial Court proceeded on an incorrect assumption that the motive stood established, even though the facts did not suggest this.

42. The Appellate Court's majority judgment,⁵³ which comprised of 963 paragraphs, probably the longest judgment in any criminal case, upheld the High Court's judgment. The majority of the Judges of the Appellate Court took an even more novel approach, by first holding that the four co-accused and two approvers were not accomplices but witnesses, and then holding (on this entirely incorrect assumption) that they did not *require corroboration*.

⁵¹ Illustration (b) of Article 129 of the Qanun-e- Shahadat, 1984.

⁵² *Qabil Shah v State*, PLD 1960 Karachi 697.

⁵³ The majority judgment was authored by Anwarul Haq, CJ, and was agreed by Mohammad Akram, Karam Elahee Chauhan and Nasim Hassan Shah, JJ.

Corroboration of accomplices was categorized as an *artificial requirement*. 'Without introducing an artificial requirement of corroboration of his evidence by applying the rule contained in illustration (b) to section 114 of the Evidence Act.' Disregarding a statutory provision and declaring it to be an *artificial requirement* did not behove judges, and all the more so when the object of the law is to prevent wrong convictions.

The Asserted Motive - Constitutional Protection

43. The motive cited by Mr. Kasuri for targeting him was his political differences with Mr. Bhutto. Mr. Kasuri cited Mr. Bhutto's speech of 3 June 1974 in the National Assembly and the exchange of words between them as the *motive* for the crime. Other speeches in the National Assembly were also referred to, and relied upon, to support *motive*. The proceedings of the National Assembly were also relied upon by the Courts. This was not permissible. The Constitution stipulates that, '*no member shall be liable to any proceedings in any court in respect of anything said*'⁵⁴ in Parliament. This constitutional provision, and protection accorded to the Members of Parliament, was not even considered.

44. Mr. Kasuri stated that he was an opponent of Mr. Bhutto yet whatever he said was believed. The possibility of others having a motive, which were mentioned in *Report of the Tribunal* was not explored. Mr. Khan was shot at and died; the investigators also did not consider the possibility that Mr. Khan may have been the intended target. There were also two ladies in the ill-fated car but, surprisingly, neither of them, nor any of the other children of Mr. Khan were examined to consider whether someone else may have had a motive. Mr. Bhutto's enmity with Mr. Kasuri was cited by Mr. Kasuri as the *motive*, however, it was not even considered that such enmity could equally be a reason to falsely implicate Mr. Bhutto.

⁵⁴ Constitution of Islamic Republic of Pakistan, Article 66(1).

Did Mr. Bhutto or Mr. Kasuri have Motive?

45. The entire prosecution case was premised on the motive which Mr. Kasuri asserted. However, this at best was an expression of suspicion; he could not say that he had personal knowledge of any specific conspiracy on Mr. Bhutto's part. When Mr. Kasuri testified in Court he undermined his own credibility, and consequently the suspicion he harboured that Mr. Bhutto was behind the attack. Mr. Kasuri had successfully contested on the Pakistan Peoples Party ('PPP') ticket from Kasur (NA 63) in the general elections held in 1970. He stated that Mr. Bhutto had '*suspended my primary membership of PPP*' on 2 May 1971. And the very next day, '*On 3.5.1971, in a Press Conference I floated my own group in the PPP, which was known all over the country as PPP (Raza Progressive Group).*' Mr. Kasuri stated that he then '*made a temporary peace with Mr. Bhutto as a matter of political strategy... in the year 1972.*' But, '*Immediately after the lifting of the Martial Law on 21st April, 1972, I showed my teeth against Mr. Bhutto and revived my old role of criticising him both outside and inside the National Assembly of Pakistan.*' He continued, '*Mr. Bhutto formally expelled me from the PPP in October, 1972. In June, 1973 I joined Tehrik-I-Istiqalal and I re-joined PPP on 6th April 1976. I joined the PPP because of instinct of self-preservation, because I knew I was a marked man.*' The inconsistencies in Mr. Kasuri's testimony abound.

46. Mr. Kasuri attributed the killing of his father to Mr. Bhutto but had no qualms applying to him for a PPP ticket to contest the 1977 general elections - '*I did apply for a PPP ticket for election to the National Assembly this year, ... The ticket was not awarded.*' Surely, *self-preservation* could not be a reason for applying for a PPP ticket in the coming elections. Mr. Kasuri was confronted in cross-examination with his letter (P.W. 1/19) through which he had requested for an interview with Mr. Bhutto, and he stated, '*This request for seeking an interview pertains to the period from 8th of January to 30th of January, 1977, because in this period the*

tickets had to be decided and I was seeking an interview in relation to that.'

Motive Vitiating by Mr. Kasuri

47. Mr. Kasuri undermined his own narrative and credibility. He rejoined the PPP, headed by Mr. Bhutto, who he had earlier accused for the murderous attack on him, but which had killed his father. Mr. Kasuri tried to resolve this contradiction by saying that he did so for *self-preservation*. This explanation is difficult to accept, because it would mean that when his father was killed in 1974 he had acted bravely and nominated the Prime Minister for conspiracy and murder but later cowardice awashed over him. It is inexplicable why he would solicit the PPP ticket from the nominated accused after the murder of his father. The justification he offered was irreconcilable and unbelievable. It was imperative for the Trial Court to have scrutinized Mr. Kasuri's vacillating explanations and for the Appellate Court to have analyzed his recorded testimony in this regard, but unfortunately this was not done. The entire prosecution case was premised on Mr. Bhutto having the motive to have Mr. Kasuri killed. A motive which Mr. Kasuri himself vitiated.

48. The Trial Court and the Appellate Court gave credence to the *motive* theory, however, Mr. Kasuri's testimony could be equally treated to be that of a person wanting to settle personal scores. His testimony had created more than reasonable doubt about the alleged *motive* and it was equally suggestive of his animus towards Mr. Bhutto and to falsely implicate him. The prosecution is required to establish the guilt of an accused *beyond reasonable doubt*, which in the case of Mr. Bhutto with regard to *motive*, the attendant conspiracy and resultant killing it had not done.

Failure to Establish Motive

49. The matter of motive in this case, unlike other criminal cases, was very significant also because of the charge of conspiracy. It is also well established that in criminal cases the prosecution need not set up a motive but if it elects to do so and

then fails to establish it the prosecution suffers its consequences.⁵⁵ The motive's absence, or failure to establish it is also consequential in a murder case in which the guilt of the offender is established but the asserted motive is not. In such cases the accused invariably is not given capital punishment, but instead imprisonment for life.⁵⁶

Either Kill or Beat Mr. Kasuri

50. Masood Mahmood had confessed, and testified in Court, that Mr. Bhutto wanted one of two outcomes; either that Mr. Kasuri is killed or that he be severely beaten up. In his confessional statement⁵⁷ Masood Mahmood said, '*He [Mr. Bhutto] then ordered me to tell Mian Abbas to get on with it and produce either Ahmed Raza Kasuri dead body or his body totally bandaged all over...*'. And, that, '*After giving orders to Mian Abbas I carried on normal work....*'. In his testimony (recorded before the five-Member Trial Court) he said, '*The Prime Minister went on to instruct me that I should ask Mian Muhammad Abbas to get on with the job and to produce the dead body of Mr. Ahmed Raza Kasuri or his body bandaged all over.*' And, '*I repeated to [Mian Muhammad Abbas] him the orders of the then Prime Minister verbatim.*' He did not disclose the *orders* that he gave to Mian Abbas. Masood Mahmood (in following Mr. Bhutto's stated orders) could have elected to direct that Mr. Kasuri be given a severe beating, however, he presumably elected to order that he be killed. This aspect neither the Trial Court nor the Appellate Court considered. Therefore, Masood Mahmood, and not Mr. Bhutto, would be liable for the killing.

First Information Report - FIR

51. The crime was first reported to the police, not by Mr. Kasuri, but by his brother, as Mr. Kasuri himself stated. '*My brother, Maj. Ali Raza rang up S.S.P. [Senior Superintendent of Police] Lahore*

⁵⁵ *Hakim Ali v State*, 1971 SCMR 432, 445C, *Habibullah v State*, PLD 1969 Supreme Court 127, 130A.

⁵⁶ *Hakim Ali v State*, 1971 SCMR 432.

⁵⁷ Code of Criminal Procedure, 1898, section 164.

and told him about this incident on the telephone. S.S.P., Lahore at that time was Mr. Asghar Khan, who after, receiving this message on the telephone arrived in the hospital ... alongwith others. A large contingent of Police also arrived on various kinds of vehicles.' S.S.P. Lahore (PW 12) also confirmed that the crime was first reported by 'Major Ali Raza son of Nawab Muhammad Khan Kasuri, after midnight.' Major Ali Raza, who first informed the police, was also in the hospital when the police reached it. However, the FIR did not mention Major Ali Raza as the informant and the FIR's complainant.

52. Mr. Kasuri submitted a written complaint after almost three hours had elapsed since the crime, in which he mentioned Mr. Bhutto. The FIR was registered at 3.45 am on 11 November 1974 which showed Mr. Kasuri (and not his brother) as the informant/complainant.

53. Section 154 of the Code requires that when information of a cognizable offence is given to the police it is required to be recorded by the officer in charge of the concerned police station. The categorization of reporting of a crime and reducing it into writing as the *first information report* (FIR), as its name suggests, is the very *first* information of a cognizable crime received by the police. An important object of the FIR, which courts consider, is that the crime was promptly reported to the police without retrospection and embellishment.

54. The first reporting of the crime to the police was by Major Ali Raza, however, the FIR was not registered when he reported the crime, nor was he cited as the informant/complainant in the FIR when it was registered. Surprisingly, Major Ali Raza was also not produced as a witness. This glaring anomaly went unnoticed by the Trial Court as well as by the majority of the Appellate Court. On its own this may be inconsequential but since the courts had categorized Mr. Kasuri as the *informant*, had assumed that the FIR was promptly recorded, without Mr. Kasuri having had time to embellish it and to falsely implicate Mr. Bhutto, and the

prosecution had alleged that there was a conspiracy by basing it on the contents of the FIR, all of which the courts had unquestioningly accepted, it became most significant. This was yet another aspect showing that the law and the constitutional safeguards to ensure a fair trial had been disregarded.

The Co-accused

55. All the six co-accused were arrested after General Zia's takeover and the imposition of Martial Law, and all of them had confessed to the crime. This remarkable coincidence neither the Trial Court nor the Appellate Court considered to be unusual nor was it ever considered whether these confessions could have been induced. Two of the accused were pardoned and made approvers. One retracted his confession before the Trial Court but reiterated it before the Appellate Court. The remaining three co-accused did not even engage a counsel and the Trial Court appointed a counsel (at State expense) to represent all three of them, however, their counsel⁵⁸ at every juncture wanted to implicate, rather than extricate, his clients and was at pains to reinforce the prosecution case to prove Mr. Bhutto's guilt and thus of his own clients. It was the duty of the counsel, and of the Trial Court, to explain to these three co-accused that to abide by the command of a superior is not a defence to the charge of murder, but this was not done.

Supreme Court Bench Reconstituted

56. Nine Judges commenced hearing the appeal filed by Mr. Bhutto,⁵⁹ and heard it till 30 July 1978, where-after seven Judges heard it on 21 August 1978 and they announced their judgment on 6 February 1979. One of the nine Judges was Qaiser Khan, J who had retired on 30 July 1978, on his sixty-fifth birthday.⁶⁰ The Constitution envisages that an adhoc Judge may be appointed within three years of his retirement,⁶¹ but he was not appointed, despite having heard the appeal; the appellant's request in this

⁵⁸ Mr. Irshad Ahmed Qureshi, Advocate.

⁵⁹ Criminal Appeal No. 11 of 1978.

⁶⁰ Constitution of the Islamic Republic of Pakistan, Article 179.

⁶¹ *Ibid.*, Article 182.

regard was not heeded. Another Judge, Waheeduddin Ahmed, J, fell ill when the appeal was in its final stages of hearing and required about six weeks to recuperate, but rather than adjourning the case and awaiting for him to resume work the appeal was heard and was concluded in his absence. Considering that the appellant had been convicted and was incarcerated it is not understandable why Qaiser Khan, J was not appointed as an adhoc Judge after his retirement nor why the Appellate Court could not wait for Waheeduddin Ahmed, J to rejoin the Bench. This may have been inconsequential if the Appellate Court's decision was unanimous, but when four Judges had upheld the conviction and three had acquitted Mr. Bhutto it was a matter of great concern.

President's Power to Grant Pardon

57. Fazal Ellahi Chaudhry was elected as the first President of Pakistan under the new Constitution.⁶² General Zia-ul-Haq took over the office of President on 16 September 1978, without being elected to it. The Constitution grants to the President the power to *pardon, remit, suspend or commute any sentence passed by any court*.⁶³ President Fazal Ellahi Chaudhry had (on his own volition) written to General Zia-ul-Haq '*spelling out extra-judicial considerations which would weigh with the Executive in taking a decision in this matter*.'⁶⁴ However, the High Court took inexplicable umbrage with Mr. Bhutto's counsel referring to this letter. '*In these circumstances, the introduction of this letter in the present proceedings is nothing but an attempt to politicise the matter... We deprecate such an attempt*.'⁶⁵ What, however, is of significance is that Mr. Bhutto was not dealt with in accordance with Article 45 of the Constitution, despite the reasons mentioned by President Fazal Ellahi Chaudhry in his letter. This was yet another transgression

⁶² Constitution of the Islamic Republic of Pakistan, 1973.

⁶³ *Ibid.*, Article 45.

⁶⁴ Order dated 24 February 1978 in Cr. Misc. Petition No. 16-R/79 in Criminal Review Petition No. 5-R/79.

⁶⁵ *Ibid.*, authored by S. Anwarul Haq, CJ.

of due process, and to enjoy the protection of law and to be treated in accordance with law.⁶⁶

Judges who Headed the Benches

58. Justice Mushtaq Hussain, in his capacity as the Acting Chief Justice, headed the Bench of the Lahore High Court which had convicted Mr. Bhutto, and Justice Anwarul Haq was the Chief Justice of the Supreme Court and headed the Bench which had upheld the conviction. The assumption of offices by both these Judges was somewhat unusual.

(a) **Lahore High Court:** Justice Mushtaq Hussain was appointed as the Acting Chief Justice of the Lahore High Court on 13 July 1977, when Justice Aslam Riaz Hussain was holding the position of the Chief Justice of the Lahore High Court. However, Chief Justice Aslam Riaz Hussain was appointed as the Acting Governor of Punjab, and had relinquished the position of the Chief Justice of the Lahore High Court on 16 July 1977, and on the same day administered oath to Justice Mushtaq Hussain as the Acting Chief Justice of the Lahore High Court. The Chief Justice of the Lahore High Court became the Acting Governor of Punjab, who gave oath to an Acting Chief Justice who continued in his *acting* position for six months; he was given oath as Chief Justice on 16 January 1978. The Constitution does not permit the constitutional office of the Chief Justice to be kept vacant for such a long duration. A High Court consists of a Chief Justice and Judges⁶⁷ and an Acting Chief Justice is appointed temporarily and only under certain circumstances.⁶⁸ An Acting Chief Justice, who later was made the Chief Justice, had transferred a murder case to the High Court and had himself presided over the trial, which under the aforesaid circumstances gave rise to justifiable misgivings.

(b) **Supreme Court:** Justice Muhammad Yaqub Ali was the Chief Justice of Pakistan who, '*relinquished charge of the office of Chief Justice of Pakistan*' on 22 September 1977. A Judge retires or may

⁶⁶ Constitution of the Islamic Republic of Pakistan, Article 4.

⁶⁷ *Ibid.*, Article 192(1).

⁶⁸ *Ibid.*, mentioned in Article 196.

resign.⁶⁹ *Relinquishment of charge* is alien to the Constitution. General Zia-ul-Haq, promulgated Martial Law Order 6 of 1977⁷⁰ which compelled Justice Muhammad Yaqub Ali to *relinquish* the office of Chief Justice of Pakistan and enabled the appointment of another. Consequently, Justice Anwarul Haq was appointed as the Chief Justice of Pakistan on 23 September 1977, '*In pursuance of the Proclamation of the fifth day of July, 1977, read with the Laws (Continuance in Force) Order, 1977 (C.M.L.A Order No. 1 of 1977), and in exercise of all powers enabling him in that behalf ...*.' The General who had overthrown the democratic order, cast aside the Constitution, pushed aside the Chief Justice of Pakistan and appointed another in his place, one who presided over the Bench which had heard Mr. Bhutto's appeal. And, crucially, Prime Minister Mr. Bhutto was deposed by General Zia-ul-Haq, who had appointed himself as the *President of Pakistan* by issuing President's Succession Order 1978.⁷¹ These are the facts, historical irony notwithstanding.

Bias of Justice Mushtaq Hussain

59. Mr. Bhutto had repeatedly claimed that Justice Mushtaq Hussain, who was the Acting Chief Justice (later Chief Justice) of the Lahore High Court, was prejudiced against him and was motivated by bias, and that he should not conduct the trial, let alone head the Bench conducting the trial, but this objection was cast aside by the Court.

60. The mere allegation or apprehension of prejudice or bias is not sufficient to sustain it. There must be something tangible and credible which exhibits bias. However, where there is bias it corrodes impartiality, and impartiality is necessary for correct decision-making and also to engender the acceptance of decisions. '*It is not merely of some importance but is of fundamental*

⁶⁹ *Ibid.*, Article 179.

⁷⁰ Laws (Continuance in Force) (Fifth Amendment) Order, 1977, Gazette of Pakistan, Extraordinary, Part I, 22 September 1977, PLD 1977 Federal Statutes 441.

⁷¹ Gazette of Pakistan, Extraordinary, Part I, 16 September 1978, PLD 1978 Federal Statutes 156.

*importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.'*⁷²

61. Martial law was imposed on 5 July 1977 and Mr. Bhutto was arrested on 3 September 1977, in a three year old criminal case which had been closed as *untraced*. Despite having been granted bail by the High Court Mr. Bhutto was arrested on 16 September 1977 under Martial Law Order No. 12.⁷³ Mr. Bhutto had obtained bail on 13 September 1977 on the very same day (13 September 1977) Justice Mushtaq Hussain constituted a Bench headed by himself to try Mr. Bhutto and also himself heard the petition seeking cancellation of his bail.

62. The five-Member Bench constituted by Justice Mushtaq Hussain issued a show cause notice on 21 September 1977 to Mr. Bhutto, and gave him all of two days to state why the bail granted to him by the High Court should not be cancelled. The show cause notice also paradoxically directed him to appear before the five-Member Bench on 24 September 1977 despite the fact that Mr. Bhutto was incarcerated. On 21 September 1977 Mr. Bhutto challenged the transfer of the case to the High Court by Justice Mushtaq Hussain and placing it before a Bench which he headed.

63. Mr. Bhutto submitted a petition before the Supreme Court stating that Justice Mushtaq Hussain was prejudicial towards him and also had a bias against him. On 24 September 1977 the Supreme Court dismissed the application stating that the same should first be filed before the Trial Court.

64. Mr. Bhutto, pursuant to the Supreme Court order, filed applications seeking Justice Mushtaq Hussain's recusal on a number of grounds, including that: (1) Justice Mushtaq Hussain '*was prejudiced and partial against the Pakistan Peoples Party*' and in this regard his statements (published in newspapers) were

⁷² *Rex v Sussex*, [1924] 1 KB 256, per Lord Hewart, Chief Justice of England. The aphorism – 'justice is not only done, but is also seen to be done' – is a part of the *Code of Conduct to be observed by Judges of the Supreme Court and of the High Courts of Pakistan*.

⁷³ PLJ 1977 Federal Statutes 276.

referred to. (2) The application seeking cancellation of bail, which was granted on 13 September 1977 by K.M.A. Samdani, J of the High Court, was placed before a five-Member Trial Court, constituted by Justice Mushtaq Hussain, and bail was cancelled on 8 October 1977, which could not be done by the Trial Court (because bail had been granted by the High Court), and that too without giving sufficient notice. (3) Upon acceptance of the office of Chief Election Commissioner Justice Mushtaq Hussain ceased to be Acting Chief Justice/Chief Justice because the Constitution stipulated that the Chief Election Commissioner could not hold another office.⁷⁴ (4) Specific instances of prejudicial conduct and bias during the conduct of the case were also mentioned. (5) The transfer of the trial from the Court of Session to the High Court, without notice to the accused, further confirmed the prejudice and the bias of Justice Mushtaq Hussain. (6) Private complaint case, on the same facts, was fixed for hearing before a Bench of the High Court,⁷⁵ however, Justice Mushtaq Hussain got it placed before the Bench he constituted and headed. (7) And, that Justice Mushtaq Hussain had not taken the oath prescribed under the Constitution but one crafted by the Chief Martial Law Administrator, therefore, he could not be considered to be the Acting Chief Justice or the Chief Justice of the Lahore High Court under the Constitution.

Bias of Trial Court

65. The five-Member Trial Court Bench unanimously dismissed the applications⁷⁶ filed by Mr. Bhutto. Request for recusal of a Judge is to be attended by the Judge whose recusal is sought. However, the Bench gave detailed findings on the objections which had been raised by Mr. Bhutto with regard to Justice Mushtaq Hussain. Justice Aftab Hussain⁷⁷ wrote the order through which Mr. Bhutto's applications (seeking recusal) were dismissed. Justice Mushtaq Hussain simply wrote two words – '*I agree*' – on the order. The Hon'ble Judges signing this order justified taking oath under

⁷⁴ Constitution of the Islamic Republic of Pakistan, Article 216.

⁷⁵ K.M.A. Samdani and Mazharul Haq, JJ.

⁷⁶ Order dated 9 October 1977 authored by Aftab Hussain, J.

⁷⁷ *Ibid.*

Martial Law⁷⁸ (and not under the Constitution) because if they did not do so '*it will lead to the result that there is no superior Court in Pakistan.*' The expression of such nihilism was wholly unjustified, and unnecessary when attending to a request for the recusal of a Judge. The Judges forgot that '*Obedience to the Constitution*' was their '*basic obligation*', like it is of every person in Pakistan.⁷⁹ And, that they had also taken the oath to '*preserve, protect and defend the Constitution.*'⁸⁰ Such anomie expressed by the Judges undermined the Constitution, and the necessity to abide by it. The order had a devastating effect on citizens and the body politic. Inculcating acceptance of autocratic rule and making it difficult to shake off the yolk of servitude.

66. The order dated 9 October 1977 also gave a definite finding with regard to Justice Mushtaq Hussain simultaneously holding the offices of Acting Chief Justice and of the Chief Election Commissioner by staggeringly extraordinary reasoning - '*The Acting Chief Justice cannot be said to have been appointed as Chief Election Commissioner under the Constitution. His appointment is regulated by Election Commission of Order, 1977 (President's Post Proclamation Order 4 of 1977).*' The applicable constitutional provisions with regard to the Chief Election Commissioner⁸¹ were disregarded in preference to the proclamation of one man, who had assumed power unconstitutionally. Incongruity mocked when the Chief Election Commissioner could not even ensure that the stated '*forthcoming General Elections*' were held, for which he was chosen and given the office of the Chief Election Commissioner. Scorching irony replaced unconvincing reasoning.

67. With regard to Justice Mushtaq Hussain's transfer of the trial from the Court of Session to the High Court, without issuing

⁷⁸ High Court Judges (Oath of Office) Order, 1977, President's Order (Post Proclamation) No. 1 of 1977, High Court (Appointment of Acting Chief Justices) Order, 1977 and Supreme Court Judges (Oath of Office) Order, 1977.

⁷⁹ Constitution of the Islamic Republic of Pakistan, Article 5. This Article originally used the word 'basic'. It was replaced with the word 'inviolable' through President's Order No. 14 of 1985.

⁸⁰ *Ibid.*, Third Schedule.

⁸¹ Articles 213, 214, 215 and 216.

notice to Mr. Bhutto, the order disregarded the age old wisdom that a party is entitled to an opportunity of a hearing.⁸² It held that, '*No such notice was required in the present case.*' This flagrantly disregarded the *due process* principle which is firmly embedded in our jurisprudence.

68. Mr. Bhutto's objection to the assumption of jurisdiction by the five-Member Bench and also that of the complaint case (filed by Mr. Kasuri) after it was listed for hearing before '*a Division Bench consisting of K.M.A. Samdani, J and Mazharul Haq, J*' was brushed aside by expressing surprise. '*It looks rather strange that the accused petitioner should prefer to be tried by a Bench of two Judges and not a larger Bench of five Judges bound by their oath of office to impart justice without fear or favour.*' The learned Judges of the Trial Court referred to their oath, but forgot that they had also taken one under General Zia-ul-Haq's dispensation. In any event the two Judges of the Division Bench were as *bound by their oath of office to impart justice* as were the five. Stressing that they were *bound by their oath* and to state that the '*constitution of such a Bench [of five Judges] should inspire more confidence rather than create any apprehension in the mind of any party*' was quite unnecessary.⁸³ In any event, and with hindsight, the apprehension of Mr. Bhutto proved to be correct.

69. In Justice Mushtaq Hussain transferring the trial to the High Court, taking away the pending complaint case from the Division Bench of the High Court and fixing it before the Trial Court, which he himself headed, was extraordinary. The law was not followed and settled methodology departed from.

70. Bias was on display in a number of paragraphs of the Trial Court judgment. Gratis observations were made which had absolutely nothing to do with the case before the Court, which was, whether Mr. Bhutto had conspired to order the assassination of

⁸² In Latin – *audi alteram partem*.

⁸³ Reverberating the famous line from William Shakespeare's play *Hamlet* – '*The lady doth protest too much, methinks.*'

Mr. Kasuri. Extraneous paragraphs were written to dishonour and disgrace Mr. Bhutto by five Hon'ble Judges who deemed it necessary to state that, before Mr. Bhutto sought '*election to the office of the Chief Executive of the Federation he would order his own life in accordance with the injunctions and teachings of Holy Qur'an and Sunnah.*' The priggish sanctimony, with respect, did not stop here. The moralizing continued:

'Before undertaking to observe the principles of democracy, freedom, equality, tolerance and social justice, as enunciated by Islam he should inculcate these qualities in himself. Before a person embarks upon swearing to strive to preserve the Islamic ideology he would bring himself to believe in that ideology and test his firmness in that belief. Before presuming his ability to guarantee to the citizens the enjoyment of the protection of law and their treatment in accordance with law he would be a believer and a true adherent of law. He would consider himself to be as much subject to law as he would wish others to be. A person who considers the Constitution and the law as the handmaid of his polity is neither qualified to be elected to the high office of the Prime Minister nor can ever be true to his Oath.'

71. Mr. Bhutto was neither on trial for corruption nor for violating the Constitution, however, the Hon'ble Judges made gratuitous remarks about these matters too. And, he '*treat[ed] the Constitution and the law as a source of unlimited power for himself which may satisfy his own inane craving for self-aggrandisement and perpetuation of his rule. Such a person, in all probabilities, would destroy the very basis of the Constitution and the law which he is sworn to uphold.*' Such pontification, however, overlooked the overthrow of the constitutional order and democratic rule on 5 July 1977, and of the unabated and continuous savagery of the Constitution.

72. Another discordant note in the order of the Hon'ble Judges of the Trial Court was expounding the virtues of equality:

'Islam does not believe in the creation of privileged classes. It believes in the equality before law of all - ruler and governed alike. It is opposed to all types of class distinction. Even the Caliph, the King, the Prime Minister or the President, by whatever name the ruler

may be called, is as much subject to the law of the land as any ordinary citizen.'

But no attention was paid to the exceptionalism, and untouchability of General Zia-ul-Haq, the Chief Martial Law Administrator, who had gathered, in himself, all the powers of an absolute monarch.

73. The Appellate Court could not stomach the aforesaid '*gratuitous observations in paragraphs 610 to 611 of its judgment regarding the personal beliefs of the appellant, delivering a sermon as to the mode of conduct prescribed by Islam for a Muslim ruler.*' The Appellate Court, however, considered that justice would be served if these paragraphs were expunged from the judgment of the Trial Court.⁸⁴ It overlooked what was glaringly obvious – the self-expressed prejudice and bias of the Trial Court.

Adulation and Praise for a Dictator

74. The Trial Court, which had tried and convicted Mr. Bhutto, and the Appellate Court, which had dismissed his appeal, were operating when there was no constitutional rule in the country and one man's will (and whim) became *legislation* and his person had replaced the entire democratic order. Unfortunately, the Chief Martial Law Administrator was adulated in another case.⁸⁵ He was stated to have '*stepped in to save the country.*'⁸⁶ The expression of such incredulous admiration undermined the credibility of the Appellate Court. Was it not obvious that General Zia-ul-Haq would be the direct beneficiary of a guilty verdict. If Mr. Bhutto was acquitted he may have proceeded to prosecute General Zia-ul-Haq for the crime of high treason. General Zia-ul-Haq's personal survival depended on Mr. Bhutto being found guilty. The continuation of usurped power required Mr. Bhutto to be convicted.

⁸⁴ *Zulfiqar Ali Bhutto v State*, PLD 1979 Supreme Court 53, paragraph 935.

⁸⁵ *Begum Nusrat Bhutto v Chief of Army Staff*, PLD 1977 Supreme Court 657.

⁸⁶ *Ibid.*, 723AA.

People's Mandate

75. General Zia-ul-Haq's unconstitutional act was '*construed in the nature of a mandate from the people of Pakistan*.'⁸⁷ It was not at all necessary, nor desirable, to state how popular he was. It was not for the Supreme Court to measure populism, nor what it entailed.

Absence of Fair Trial and Due Process

76. The Supreme Court, including the three Hon'ble Judges of the Supreme Court who acquitted Mr. Bhutto,⁸⁸ had also declared, '*that the Fundamental Rights stand validly suspended since 5th of July 1977*.'⁸⁹ Therefore, and admittedly, the trial was conducted and the appeal heard without Mr. Bhutto having the constitutional protection of the Fundamental Rights and other rights guaranteed in the Constitution. Any single one of the aforesaid noted transgressions may have vitiated the trial and the conviction, however, cumulatively they destroyed any semblance of due process and fair trial, and revealed that innocent men were rushed to the gallows.

The Courts

77. The Trial and Appellate Courts, which conducted the trial and heard the appeal, were not true courts under the Constitution. The country was captive to Martial Law and so too were its courts. When Judges take oath of allegiance to dictators, the courts are no longer of the people.

78. In conclusion we want to acknowledge the assistance provided by all the learned counsel and by the learned *amici*. However, the painstaking work undertaken by our retired colleague, Justice Manzoor Ahmad Malik, and by his team deserves special mention. The expertise, the depth of knowledge

⁸⁷ *Ibid*.

⁸⁸ Dorab Patel, Muhammad Haleem and G. Safdar Shah, JJ.

⁸⁹ *Begum Nusrat Bhutto v Chief of Army Staff*, PLD 1977 Supreme Court 657, pp. 721, 763.

and insightfulness of criminal jurisprudence provided by Justice Manzoor Ahmad Malik was most valuable and helpful.

Justice Qazi Faez Isa, CJ.

Justice Sardar Tariq Masood, J.

I will be attaching my additional note.

Justice Syed Mansoor Ali Shah, J.

I will be attaching my additional note.

Justice Yahya Afridi, J.

Justice Amin-ud-Din Khan, J.

Justice Jamal Khan Mandokhail, J.

I will contribute my opinion also in support of opinion dated 6.3.2024.

Justice Muhammad Ali Mazhar, J.

I will attach my separate additional note in support of our opinion dated 6.3.2024.

Justice Syed Hasan Azhar Rizvi, J.

Justice Musarrat Hilali, J.

Islamabad
5 July 2024.
(Farrukh)

Approved for Reporting