**IN THE HIGH COURT OF SINDH, AT KARACHI**

***PRESENT:-***
***Mr. Justice Muhammad Iqbal Kalhoro***
***Mr. Justice Shamsuddin Abbasi.***

**Spl. Crl. Anti-Terrorism Appeal No. 194 of 2019**

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| Appellant | Faisal Khan son of Maqbool Ahmed through Mr. Wazir Hussain Khoso, Advocate. |
| Respondent | The State through Mr. Ali Haider Saleem, DPG. |

**Spl. Crl. Anti-Terrorism Appeal No. 195 of 2019**

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| Appellant | Mubeen Ahmed son of Muhammad Haroon Shar through Mr. Naeem Akhtar, Advocate. |
| Respondent | The State through Mr. Ali Haider Saleem, DPG. |

**Spl. Crl. Anti-Terrorism Appeal No. 196 of 2019**

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| Appellant | Abdul Hameed Shar son of Zulfiqar Ahmed Shar through Mr. Ghulam Shabbir Shar, Advocate. |
| Respondent | The State through Mr. Ali Haider Saleem, DPG. |
| Dates of hearing | 03.02.2020, 13.02.2020, 04.03.2020, 10.03.2020, 12.08.2020, 27.08.2020 and 03.09.2020 |
| Date of Judgment | **09.10.2020** |

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**JUDGMENT**

***Shamsuddin Abbasi, J:-*** Appellants Faisal Khan, Mubeen Ahmed and Abdul Hameed Shar were tried by Anti-Terrorism Court No.II, Karachi. By a judgment dated 17.07.2019, delivered in Special Case No.28 of 2011, arising out of FIR No.80 of 2011 registered with P.S. Ibrahim Haideri /CTD for offences punishable under Sections 3, 4 and 5 of Explosive Substances Act, 1908 read with Section 7 of Anti-Terrorism Act, 1997, they were convicted for offences under Sections 3, 4 and 5 of Explosive Substances Act, 1908 and sentenced

to undergo rigorous imprisonment for seven years each, however, the benefit in terms of Section 382-B, Cr.P.C. was extended in favour of the appellants.

2. FIR in this case has been lodged on 05.03.2011 at 1515 hours whereas the incident is shown to have taken place on the same day i.e. 05.03.2011 at 1930 hours. Complainant ASI Siraj Khan, posted at P.S. Ibrahim Haideri, Karachi, has stated that on the fateful day while he was present at P.S. one Muhammad Rafiq {Ex-Councilor} reported on phone that an incident of bomb blast has taken place near Lahooti Hotel, Juma Goth, Ibrahim Haideri, Karachi. Such a report was entered in the Roznamcha vide entry No.28 and then complainant rushed to the pointed place and reached there where he saw the house had collapsed due to blast and SHO and other police officials were already present at the scene. They went inside and saw the room had collapsed where a dead body and two injured persons were lying under the debris. The debris were removed and on inquiry the injured persons disclosed their names as Sadruddin son of Abu Bakar and Ismail son of Allah Dino. Both further disclosed that they lived in the said house with Zulfiqar Kolachi and with him they have committed terrorist activities in Sindh and Karachi. They also showed their affiliation with "Jiye Sindh Mutheda Qaumi Mahaz" and disclosed that they were planning to make the strike call successful for 07.03.2011 and while making the bombs, suddenly a bomb exploded in the hand of Zulfiqar Kolachi whereupon he died and they become injured. The complainant arrested them at spot and also apprehended their two other accomplices namely, Mubeen son of Haroon and Faisal son of Maqbool while they were trying to escape on two motorcycles, who disclosed the name of their other companion as Abdul Hameed son of Zulfiqar, who made his escape good. The complainant arrested all four accused and taken into custody both motorcycles under a mashirnama prepared at spot and then sent them to P.S. in mobile whereas the injured accused Sadruddin and Ismail as well as dead body of Zulfiqar were shifted to Jinnah Hospital through ambulance for necessary proceedings wherefrom the dead body of Zulfiqar was sent to Edhi mortuary where he completed proceedings under Section 174, Cr.P.C. After completing usual formalities, he returned to P.S. and registered a case under

Sections 3 and 4 of Explosive Substances Act, 1908 read with Section 7 of Anti-Terrorism Act, 1997, vide FIR No.80 of 2011 on behalf of the State.

3. On next day of incident, the complainant was called at the place of incident wherefrom BDS officials collected explosive material weighing about 800 grams, sealed the same and handed over it to SIP Munir, who prepared a memo of seizure at spot in presence of complainant and other mashirs.

4. Pursuant to the registration of FIR, the investigation was followed by Inspector Muhammad Sajjad Khan, CID {Investigation}, Karachi. He got verified both motorcycles from ACLC whereupon it was revealed that motorcycle bearing Registration No.KEE-5369 was registered in the name of appellant Abdul Hameed while motorcycle bearing Registration No.KBF-2672 was found in the name of one Muhammad Ameen. He also taken into custody the wearing clothes of deceased accused Zulfiqar Kolachi from Jinnah Hospital and sent the same for chemical analysis. He also interrogated Appellant Abdul Hameed, already in custody of P.S. Zaman Town in injured condition, who confessed the commission of present crime and also led the police party and pointed out the place of incident and also disclosed that on the day of incident they were present in the house and while making bombs, suddenly a bomb exploded whereupon he become injured, however, he managed to escape from the scene. He recorded the statements of witnesses under Section 161, Cr.P.C. and after completing usual formalities submitted challan before the Court of competent jurisdiction under the above referred Sections, whereby the appellants were sent up to face the trial.

5. The learned trial Court took Oath as prescribed under Section 16 of Anti-Terrorism Act, 1997, on 23.07.2011.

6. A charge in respect of offences under Sections 3, 4 and 5 of Explosive Substances Act, 1908 punishable under Section 7 of Anti-Terrorism Act, 1997, was framed against appellants at Ex.3, to which they pleaded not guilty and claimed to be tried.

7. At trial, the prosecution has examined as many as fourteen witnesses namely, ASI Imam Bux as PW.1 at Ex.P/1, ASI Asghar Ali as PW.2 at Ex.P/4, HC Muhammad Amin as PW.3 at Ex.P/7, SIP Ali Asghar as PW.4 at Ex.P/8, Inspector Masab Hussain as PW.5 at Ex.P/14, complainant SIP Muhammad Siraj Khan as PW.6 at Ex.P/18, MLO Dr. Muhammad Tayyab as PW.7 at Ex.P/24, PC Muhammad Akbar as PW.8 at Ex.P/29, SIP Rana Muhammad Muneer as PW.9 at Ex.P/30, MLO Dr. Abdul Razzaq as PW.10 at Ex.P/35, MLO Dr. Syed Farhat Abbas as PW.11 at Ex.P/38, HC Inamullah Khan as PW.12 at Ex.P/41, I.O. Inspector Muhammad Sajjad Khan as PW.13 at Ex.P/43 and Inspector Muhammad Ashraf as PW.14 at Ex.76. They have exhibited number of documents in their evidence. Vide statement Ex.92/A, the prosecution closed its side of evidence on 11.05.2019.

8. Appellants Mubeen Ahmed, Abdul Hameed Shar and Faisal Khan were examined under Section 342, Cr.P.C. twice at Exs.60, 63, 67, 93, 94 and 95 respectively, wherein they denied the commission of offence and professed their innocence. Appellant Mubeen Ahmed opted not to examine himself on oath under Section 340{2}, Cr.P.C. but examined Ghulamullah as DW.1 at Ex.61 in his defence. Appellant Abdul Hameed Shar appeared on oath under Section 340{2}, Cr.P.C. at Ex.P/64 and also examined Zameer Ali as DW.2 at Ex.66 in his defence. Appellant Faisal Khan opted not to examine himself on oath under Section 340{2}, Cr.P.C. and did not adduce any evidence in his defence.

9. The learned trial Court, on conclusion of trial and after hearing the learned counsel for the parties as well as assessing the evidence on record, convicted the appellants as detailed in para-1 {supra} vide judgment dated 17.07.2019, impugned herein. Feeling aggrieved by the convictions and sentences, referred herein above, the appellants have preferred their respective appeals.

10. Since captioned appeals are outcome of a common judgment, therefore, we deem it appropriate to decide the same together through a single judgment.

11. The relevant facts as well as evidence produced before the learned trial Court find an elaborate mention in the impugned judgment, therefore, the same are not reproduced here so as to avoid duplication and unnecessary repetition.

12. It is jointly contended on behalf of the appellants that they have been falsely roped in this case by the police with malafide intention and ulterior motives as otherwise they have no nexus with the commission of offence. No independent witness has been produced by the prosecution in support of its case except police officials who are inimical to the appellants as such no reliance can be given to their testimony. The medical evidence is too meager to explain the real cause of injuries. Nothing incriminating has been recovered from the possession of appellants and the alleged recoveries are useless to connect the appellants with the commission of alleged offence. The prosecution has failed to produce any independent witness to corroborate the police witnesses. The prosecution has failed to bring on record any evidence to show that the house in question belonged to the appellant or was in their exclusive possession. The material available on record does not justify the convictions and sentences awarded to the appellants and the same are not sustainable in the eyes of law. The statements of prosecution witnesses are full of discrepancies and contradictions made therein are fatal to the prosecution's case. No incriminating evidence has been brought on record so as to establish the guilt of the appellants and the FIR has been lodged with due deliberations and consultations. The entire case of the prosecution rests on extra judicial confession of appellants before police, which is an inadmissible piece of evidence and is unsafe to rely upon. There are so many defects and lacunas in the investigation benefit of which ought to have been given to the appellants. The learned counsel further added that the appellants are respectable citizens and belong to educated families and never involved in any criminal activities having no previous criminal history and have served punishment. The learned counsel while summing up their submissions have emphasized that the impugned judgment is the result of misreading and non-reading of evidence and without application of a judicial mind, hence the convictions and sentences awarded to the appellant,

based on such findings, are not sustainable in law and liable to be set-aside and the appellants deserve acquittal. They placed reliance on the cases of *Muhammad Arif v The State* {2019 SCMR 631}, *Muhammad Mansha v The State* {2018 SCMR 772}, *Muhammad Pervaiz v The State* {2009 SCMR 1038}, *Akhtar Ali and others v The State* {2008 SCMR 6}, *Muhammad Pervaiz v The State* {2009 SCMR 1038}, *Ashiq Hussain Changezi and another v The State and another* {2016 P.Cr.L.J. 1357}, *Muhammad Ahmed v The State* {2005 YLR 954} and *Muhammad Rafiq-ul-Islam v The State* {1998 P.Cr.L.J. 1262}.

13. On the other hand, the learned Deputy Prosecutor General contends that the FIR has been lodged with sufficient promptitude wherein the appellants have duly been nominated. The witnesses while appearing before the learned trial Court remained consistent on each and every material point. They were subjected to lengthy cross-examination but nothing adverse to the prosecution story has been extracted which can provide any help to the appellants. The medical evidence in this case is in line with the ocular account furnished by the prosecution which fully corroborates the story set-forth in the FIR. The recoveries have also been proved through reliable evidence adduced by the recovery witnesses. The appellants are involved in a heinous offence of creating terror, which are directed against the society. The plea taken by the defence has no nexus with the occurrence hence it does not carry weight vis-à-vis providing help to the defence. The prosecution has successfully proved its case against the appellants beyond shadow of any doubt, thus, the appeals filed by the appellants warrant dismissal as being devoid of any merit.

14. We have heard the learned counsel for the parties at length, given our anxious consideration to their submissions and have also scanned the entire record carefully with their able assistance.

15. The incident alleged to have taken place at 3:15 pm and according to complainant ASI Siraj Khan while he was present at police station, one Muhammad Rafiq {Ex-Councilor} informed him on phone that an incident of bomb blast has taken place in a house near Lahooti Hotel, Juma Goth, Ibrahim Haideri, Karachi, and based on such information he rushed to the disclosed place

and saw the house in question collapsed due to blast and SHO and other police officials were already present there, they went inside the house and saw a dead body under the debris, whose name later transpired as Zulfiqar Kolachi while two injured persons were also lying under the debris, whose names were Sadruddin and Ismail and arrested at spot whereas appellants Faisal and Mubeen were arrested near the place of incident while they were trying to decamp on their motorcycles, the injured accused removed to Jinnah Hospital and the dead body of deceased accused was shifted to Edhi mortuary where proceedings under Section 174, Cr.P.C. were completed and then he returned back to P.S. and registered a case on behalf of the State. It is an undisputed fact that neither the alleged informer Muhammad Rafiq has been cited as witness in the challan nor he has been examined at trial. Surprising to note that the times of placing entry No.32 showing arrival of complainant at police station and registration of FIR are same i.e. 7:30 pm. This fact has caused a big dent to the prosecution story. Admittedly, the FIR has been lodged after four hours and fifteen minutes of the incident. Delay in recording the FIR has not been properly explained. Hence, presumption would be drawn that FIR has been lodged after due deliberations and consultations. Furthermore, FIR is always treated as a cornerstone of the prosecution case to establish guilt against those involved in a crime, thus it has a significant role to play, hence if there is any delay in lodging of FIR and commencement of investigation, it gives rise to a doubt and benefit thereof is to be extended to the accused. Reliance may well be made to the case of *Zeeshan @ Shani v/s The State* {2012 SCMR 428}, wherein it has been held by Hon'ble apex Court that delay of more than an hour in lodging of FIR give rise to an inference that occurrence did not take place in the manner projected by the prosecution and time was considered in making efforts to give a coherent attire to prosecution case, which hardly proved successful.

16. A close scrutiny of evidence brought on record reveals that the prosecution has not been able to establish that at the relevant point of time the appellants either were making any bomb or possessing any explosive substance under their control knowingly or making conspiracy to cause any act by an explosive substance.

The explosive material alleged to be recovered was neither affected from exclusive possession of the appellants nor the house wherefrom allegedly it was recovered belonged to them. The prosecution story is completely silent over this fact. Furthermore, nothing has been brought on record to show that the said house was in exclusive possession of the appellants or they were seen residing there. The only evidence that has been brought on record is that appellants Faisal Khan and Mubeen Ahmed were arrested in injured condition near the scene of occurrence while they were trying to escape on their motorcycles. Admittedly, nothing incriminating was recovered from the possession of appellants at the time of their arrest. It is noteworthy that the incident alleged to have taken place at 3:15 pm and the time arrest of appellants Faisal Khan and Mubeen Ahmed has been shown as 3:40 pm. The question arises why appellants Faisal Khan and Mubeen Ahmed remained present near the scene of occurrence for about 25 minutes and waited for police to come and arrest them when they could have easily escaped from the scene of occurrence on their motorcycles well in advance. Such a behavior of appellants Faisal Khan and Mubeen Ahmed does not appeal to a prudent mind that when they could have easily escaped from the scene of offence why they did not do. It is important to note that according to the case of the prosecution the police first arrested injured co-accused Sadruddin and Ismail lying in injured condition under the debris and a mashirnama was prepared at spot and subsequent thereto they arrested appellants Faisal Khan and Mubeen Ahmed near the place of occurrence under a separate mashirnama. Surprising to note that time mentioned on both memos of arrest and personal search {Ex.P/2 and Ex.P/3} is same as 3:40 pm. This position has led us to a presumption that appellants Faisal Khan and Mubeen Ahmed were not arrested in the manner as projected in the memo of arrest and personal search {Ex.P/3} and caused a big dent to the prosecution case and also question marked the medical evidence so adduced by the prosecution. Worthy to note that mashirnama of arrest of appellants Faisal Khan and Mubeen Ahmed {Ex.P/3} did not show that at the time of their arrest they were in injured condition. More so, when they were produced before the learned Administrative Judge, ATA, for seeking their remand, the police officer neither pointed out to the learned Judge that they are

injured nor made any request for referring them to hospital for medical treatment. Even the photo-graphs showing injuries to the appellants were produced through PW.14 Inspector Muhammad Ashraf {Ex.76} after completing evidence of prosecution side and recording statements under Section 342, Cr.P.C. of accused when prosecution side was reopened at the request of State counsel. Important to note these photo-graphs were never part of the prosecution file and only at the last leg of the trial were brought on record. This fact, thus, has caused a big dent to the prosecution case.

17. Insofar as appellant Abdul Hameed Shar is concerned, the prosecution has brought on record same set of evidence as that of against appellants Faisal Khan and Mubeen Ahmed. Admittedly, he was not arrested at spot and according to the case of the prosecution the police arrested him on next day of incident i.e. 06.03.2011 when he was already arrested by P.S. Zaman Town in injured condition, and during interrogation shown his willingness to point out the place of incident and voluntarily led the police party and showed the place of incident. Admittedly, appellant Abdul Hameed Shar was arrested on 06.03.2011 and the alleged pointation was made on 18.03.2011 after 12 days of his arrest without furnishing any plausible explanation. We are conscious of the fact that though such disclosure before the police no new fact was discovered. The place of occurrence was already in the knowledge of the police and such pointation is worthless, irrelevant and inadmissible as the said place was already in the knowledge of police and a site plan of the same place had already been prepared by police on 06.03.2011 as such showing the place of incident to police by appellant Abdul Hameed Shar on his pointation is of no significance.

18. It is noteworthy that the incident had taken place in broad day light at 3:15 pm and place of occurrence is shown to be in a thickly populated area and it is admitted by the prosecution witnesses that so many people had gathered at the time of blast but the complainant and/or investigating officer did not bother to associate an independent source to strengthen the case of the prosecution by collecting an independent evidence either at the time of arrest appellants or when the site inspection was carried out. At this

juncture, we have observed that the prosecution had sufficient opportunity to join an independent person from the locality, but no attempt was made either to persuade any person from the locality or for that matter the public was asked to become a witness as such there is obvious violation of Section 103 Cr.P.C. Omission, thus, rendered the case of the prosecution extremely doubtful.

19. The prosecution has not exhibited the case property in evidence as articles. Even the same has not been shown to the appellants at the time of recording their statements under Section 342, Cr.P.C. It is a well-settled principle of law that conviction can only be based upon the evidence which is put to the accused in his statement under Section 342, Cr.P.C. for obtaining his explanation and if such evidence is not put to the accused in such statement then it cannot be used against him. Admittedly, the alleged recovered explosive substance is not effected from the exclusive possession of the appellants nor any evidence has been brought on record to establish the house wherefrom it has been shown recovered belonged to the appellants or in their exclusive possession. Thus, such recovery by itself is not sufficient to bring home the charges against the appellants more particularly when the other material put-forward by the prosecution in respect of guilt of the appellants has been disbelieved. It has been affirmed by the Hon'ble Supreme Court in case cited as 2001 SCMR 424 *{Imran Ashraf and 7 others v The State}* in the following manner:-

> *"Recovery of incriminating articles is used for the purpose of providing corroboration to the ocular testimony. Ocular evidence and recoveries, therefore, are to be considered simultaneously in order to reach for a just conclusion".*

Likewise, if any other judgment is needed on the same analogy, reference can be made to the case of *Dr. Israr-ul-Haq v. Muhammad Fayyaz and another* reported as 2007 SCMR 1427, wherein the relevant citation (c) enunciates:

> *"Direct evidence having failed, corroborative evidence was of no help. When ocular evidence is disbelieved in a criminal case then the recovery of an*

> *incriminating article in the nature of weapon of offence does not by itself prove the prosecution case.*

20. Apart from above, the prosecution has based its case on the confessions allegedly made by the appellants before police, but they have not confessed their guilt before the competent Court of law, therefore, the alleged admissions before police have no evidentiary value in view of Article 38 of the Qanun-e-Shahadat Order, 1984. A confession before police is inadmissible in evidence in normal course, but in cases where the accused is facing the charges of terrorism Section 21-H of the Anti-Terrorism Act, 1997, has made such a confession before police conditionally admissible with a condition that there should be some other evidence including circumstantial evidence, which must reasonably connect the accused with the alleged offence before a confession made by the accused before the police is accepted by a Court. Such conditional admissibility of a confession before police is contingent upon availability of some other evidence connecting the accused with the offence charged with, but in the present case, as discussed herein above, all the other pieces of evidence relied upon by the prosecution against the appellants have utterly failed to connect them with the alleged offence. In this view of the matter the case in hand is not a fit case wherein the Court could even consider the confession before police attributed to the appellants.

21. The appellants have raised plea that they were already in custody of police since 03.03.2011 and subjected to severe torture at P.S. whereupon they sustained injuries. Appellant Faisal Khan while recording his 342, Cr.P.C. statement has stated he was picked from his house on 03.03.2011 and subject to severe torture at P.S. and then falsely roped in this case. Appellant Mubeen appeared on Oath under Section 340{2}, Cr.P.C. and also examined Ghulamullah in his defence at Ex.61. He has stated that while he was sitting at Quetta Hotel, Gulshan-e-Hadeed, a police mobile came in which some persons were in police uniform and some in civil dress and took him with them, subjected to torture and then falsely implicated him in this case for the reason that he was union leader of Denim company. Appellant Abdul Hameed Shar while

appearing on oath at Ex.64 has stated that he has been falsely implicated in this case on account of a dispute with ASI Siraj over a plot. He deposed that while he was parking his motorcycle at hotel for having a cup of tea, ASI Siraj alongwith 3/4 other persons in plain clothes came in cultus car and forcibly took him to P.S. where he was subjected to severe torture. He has also examined Zameer Ali in his defence. All of them have denied the prosecution case as well as inflicting the injuries due to bomb blast and stated that they are respectable citizens and belong to educated families and never involved in any criminal activities having no previous criminal history and they are not previously convicted in any case. The pleas so taken by the appellants in their defence seem to be plausible in view of the mitigating circumstances and our discussion, referred herein above, more particularly when neither any incriminating article has been recovered from their possession nor any evidence has been brought on record to establish that the house in question either belonged to them or in their possession. There is no evidence to show that appellants were seen making the bombs from alleged recovered explosive substance to make the case against them worthy of consideration. The testimony of police officials, without support of independent corroboration, is unsafe to rely upon. Reliance may well be made to the case of *The State v Muhammad Shafique alias Pappo* {PLD 2004 Supreme Court 39), in which it has been observed as under:-

> *"It has been established by the evidence of Muhammad Saeed Abid C.W. that the respondents were neither the owners of said house nor tenants. It being so, it is very hard to believe that they were occupying it and were living therein. Learned High Court specifically noted that despite the fact that it was known to the prosecution that the house belonged to aforesaid witness, yet, no evidence was collected to show that the respondents were in its possession. Neither Chowkidar nor labourers nor neighbours were joined by the investigating agency to demonstrate that ever any of them was seen entering or coming out from it. The alleged recoveries of explosive substances, weighing about 30 kgs. a kalashnikov with 25 live rounds loaded in the magazine from under the mattress of respondent Abdul Jabbar and a wooden box from under said bed of respondent Muhammad Shafique, containing 10 detonators 10 igniters, a T.T pistol loaded with six live rounds, do not inspire confidence, as so much could not be concealed under said mattresses".*

22. It is a well settled principle of law that involvement of an accused in heinous nature of offence is not sufficient to convict him as the accused continues with presumption of innocence until found guilty at the end of the trial, for which the prosecution is bound to establish the case against the accused beyond any shadow of reasonable doubt by producing confidence inspiring and trustworthy evidence. The prosecution has not been able to bring on record any direct evidence. Rather, there are so many circumstances, discussed above creating serious doubts in the prosecution case which cut the roots of the prosecution case and according to golden principle of benefit of doubt one substantial doubt would be enough for acquittal of the accused. The rule of benefit of doubt is essentially a rule of prudence, which cannot be ignored while dispensing justice in accordance with law. Conviction must be based on unimpeachable evidence and certainty of guilt and any doubt arising in the prosecution case, must be resolved in favour of the accused. The said rule is based on the maxim "it is better that ten guilty persons be acquitted rather than one innocent person be convicted" which occupied a pivotal place in the Islamic Law and is enforced strictly in view of the saying of the Holy Prophet (PBUH) that the "mistake of Qazi (Judge) in releasing a criminal is better than his mistake in punishing an innocent".

23. The epitome of whole discussion gives rise to a situation that the appellants have been convicted without appreciating the evidence in its true perspective, rather the prosecution case is packed with various discrepancies and irregularities, which resulted into a benefit of doubt to be extended in favour of the appellants not as a matter of grace but as a matter of right. Accordingly, we hereby set-aside the convictions and sentences recorded by the learned trial Court by impugned judgment dated 17.07.2019 and acquit the appellants of the charge by extending them the benefit of doubt. They shall be released forthwith if not required to be detained in connection with any other case.

24. The captioned appeals stands allowed in the foregoing terms.

JUDGE

JUDGE

Naeem