

A Judiciary in Crisis?

The Trial of Zulfikar Ali Bhutto



Reproduced by

Sani H. Panhwar

Member Sindh Council PPP

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Madras, September 1988

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PREFACE

The winds of change were blowing over three countries in South Asia. In India, the Janatha Government led by Moraji Desai replaced Indira Gandhi's Government on the 24th of March 1977 after a general election. In Pakistan, Bhutto's Government was thrown out by General Zia-Ul-Haq after a military coup, on the 5th of July 1977. The United National Party led by Junius Jayewardene took over power from Srimavo Bandaranaike in Sri Lanka on the 24th of July 1977 after her party was defeated by a 5/6 majority on the 21st of July 1977 at a general election.

While the changes in India and Sri Lanka were effected by democratic processes, in Pakistan it was a coup followed by the promulgation of Martial Law which totally and completely extinguished all vestiges of a democratic system.

Jayewardene's government was a frighteningly strong government with an utterly weak opposition, but the Government of Moraji Desai was a weak one composed of warring factions. In each of these countries the Judiciary inevitably found itself in changed situations. The governments in Sri Lanka and India, capitalised on the blunders of their predecessors whose pro-socialist and anti-American stances encountered many storms compelling each to resort to an emergency rule. In Pakistan, however, Bhutto's land reform, his economic and foreign policies made many enemies from vested interests. There were decisive changes in the policies of the new governments.

In all these 3 countries there was a swing to the extreme right. The Janatha government, however, made a quick exit and the Judiciary in India did not face much of a crisis in the Janatha set up. The new governments in Pakistan and Sri Lanka continue to last to this day.

The Judiciary in Pakistan was called upon to try Bhutto on a murder charge of which he was found guilty in a most disturbing political context. The reader of this book will have to answer the question after examination of the events in the Bhutto Trial whether the Judiciary faced a crisis and if so, whether it survived the crisis?

In Sri Lanka, in a totally democratic context the Judiciary was called upon to inquire into the allegations of abuse of power by Mrs. Bandaranaike, an offence unknown to the law till the Presidential Commission Act and not defined even then. She was found guilty of such abuse and she was ultimately deprived of her civic rights by Parliament. There was much controversy about the findings of the Presidential Commission and its decision which led to her being driven into the political wilderness. Whether the Judiciary in Sri Lanka faced a crisis and if it did in any manner, whether it faced up to it are questions not within the scope of this book. The sole objective of this book is to reveal the Trial and Appeal of Zulfikar Ali Bhutto in the then prevalent and surrounding circumstances and to focus attention on the performance of the Judiciary in Pakistan.

The trial of Zulfikar Ali Bhutto was before five judges of the High Court and they were unanimous in their decision to find Bhutto guilty but it was only in appeal that the judges of the Supreme Court were divided 4 to 3. It was very unfortunate that although all nine judges of the Supreme Court commenced hearing the appeal, one judge Quaisar J., retired from the Court after he reached the age of retirement and another judge Waheeduddin J., was incapacitated from functioning on the Bench having suffered a cerebro-vascular stroke.

It is sad to note that he suffered this stroke at the tail end of the hearing of the appeal. The appeal commenced on the 20th of May 1978 and the judge fell ill on the 20th of November 1978. The Court waited three weeks for the judge's recovery and when that was not to be, it resumed the hearing which concluded on the 23rd of December 1978. The judgements were delivered on the 6th of February 1979. Well, one judge made all the difference. There was that one judge and he could have been the Chief Justice, Anwarul Hag whom Bhutto objected to hearing his appeal for the reasons,

1. that he had publicly criticized Bhutto's Government and party and declared General Zia "A National Saviour";
2. that he was closely associated with the Chief Justice of the Lahore High Court who had found Bhutto guilty;
3. that he had acted as Head of State during President Chaudhury's absence abroad during the Martial Law regime and he had temporarily merged the military executive with the judiciary.

Anyway, these objections were rejected by the Chief Justice as unfounded and based on a "misunderstanding" The Chief Justice reassured himself and all concerned that he was only one of nine judges who were going to hear the appeal. It happened however by a quirk of fate that Bhutto was ultimately hanged by one judge making all the difference. Was that one judge necessarily right and necessarily infallible when he joined the three who disallowed the appeal?

Although the Bhutto Trial is the most notable trial of the century, it is a trial about which the least is known. It is not in the interests of justice for some to say Bhutto was guilty and for others to say that he was innocent without knowing the facts of the case. There are some who even say that whether Bhutto was guilty or not, he should never have been hanged. This is most unfair to Bhutto. Never during the appeal or thereafter did Bhutto ask for mercy. In fact, he had strictly instructed his lawyers and the members of his family that no such application should be made. The purpose of this book is to assist the people to answer that one question, "Was Bhutto proved guilty at the Trial?" And the next question, "Was there a fair trial without bias?"

A considerably important part of the proceedings during the Trial was held in camera. The public was very often denied access. Newspaper reports were heavily censored and

on many occasions publications of newspapers were stopped. There was Martial law and a Military Regime from the 5th of July during the investigation, during the Trial, during the Appeal and for a long time thereafter. What was still more unfortunate was the fact that the judgements of the Supreme Court ran to 709 pages heavily littered by a multitude of judicial decisions in other cases. The facts of these other cases occupy a considerable portion of the judgements. With great respect, it may be said that the judgements of the Supreme Court, except that of Haleem J., are far too learned and far too dependent on case law to support well established simple, principles of law. The learning of the judges was manifestly admirable and the hard work put in by them was patently clear and commendable but, unfortunately, the judgements had inevitably become far too heavy to serve any useful purpose for the understanding of the people. It will be an interesting question to ask how many members of the Bar had read these judgements.

These judgements can give the wrong impression that the evidence was bulky and voluminous whereas the conviction was really based mainly on the testimony of Masood Mahmood, the Director - General of the Federal Security Force, who turned approver. He made his statement implicating Bhutto only in August 1977 about the alleged incident of the killing of Kasuri's father on the 10th of November 1974. His statement was obtained after promulgation of Martial law after this witness with other officers in the Security Services was taken into custody and kept in indefinite detention. One of the officers in custody sent a petition about all the misdeeds of Masood Mahmood. Under interrogation while in solitary confinement, the latter took up the position that he was only reluctantly carrying out Bhutto's orders as Prime Minister because he feared for his life and those of the members of his family. He played no direct role in the crime, he claimed. He was only a conveyor of an order to the second accused, Mian Abbas, and he was asked by Bhutto to remind Mian Abbas of the job already entrusted to him. Masood Mahmood is the star and the only direct witness for the prosecution to implicate Bhutto as the arch conspirator and instigator for the murder of his political opponent, Ahmad Raza Kasuri, which resulted unintentionally in the death of his father, Nawab Muhammad Khan, in November 1974. Masood Mahmood is the self-confessed criminal whose confession to save his own skin bought him a pardon. These facts cannot be disputed. On the other hand, the law does not reject him as a competent witness. The law even says that his evidence without corroboration can be acted upon. A rule of prudence, a rule of fairness, a rule of justice, a rule of commonsense, however, tells the judge, "Be cautious, test and examine his evidence even as you do the evidence of other witnesses but in the case of the testimony of a participant in the crime be all the more careful".

In this particular case, Masood Mahmood stood to gain by admitting and avoiding, by confessing and implicating Bhutto who it cannot be doubted was the prize quarry for the Martial Law regime. With regard to accomplices, the law says only what commonsense says, "Act on the accomplice's evidence by all means. We do not prevent you from doing so, but if you are prudent and if you want to be fair, if you do not want your conscience to be stricken and if you do not want your judicial mind to be disturbed by second thoughts, we tell you to look for corroboration which in simple parlance means supportive evidence from an independent source which means from some source other than from the accomplice and which supportive evidence unmistakably implicates the accused in the

crime”. The law does not say anything more. It does not say anything less. It is most interesting how law and commonsense give the same guidance each based on principles of justice and fairness.

There was the evidence of Kasuri, the son of the unintended victim. He was a bitter critic of the Prime Minister. On the 4th of June 1974, he annoyed the Prime Minister and the latter shouted at him on the floor of the National Assembly, “I have had enough of you; absolute poison. I will not tolerate your nuisance”. This is supposed to be motive for the Prime Minister to enter into a conspiracy to kill Kasuri. Certainly, it indicates that the Prime Minister was annoyed in the extreme with Kasuri, it can even show hostility and bad feelings but does this outburst and the fact that Bhutto counted him as his bitter political opponent necessarily prove a motive to kill? The killer can have a manifest motive or need not have a manifest motive. Motive by itself does not prove guilt nor does lack of a manifested motive prove innocence. Therefore, what is inconclusive by itself is not supportive evidence to corroborate an accomplice. This is an absolute commonsense principle. If it were otherwise a man who is the actual killer can shove the responsibility for the crime on another who is manifestly an enemy of the victim. If the motive is supportive evidence, then the actual killer’s false evidence and the motive evidence can be acted upon to perpetrate a travesty of justice. Motive can only strengthen acceptable evidence but non-acceptable evidence does not become acceptable evidence because of motive evidence. The commonsense principle is that motive or ill-feeling is by itself inconclusive, and it remains inconclusive to support the evidence of an accomplice who is totally unacceptable as a witness of truth.

There is other evidence led by the prosecution of a circumstantial nature. Here again, commonsense tells what the law also tells. “Do not find an accused guilty unless the circumstances lead to only one inference and necessarily that only inference must be that the accused is guilty. All the circumstances must point the finger of guilt relentlessly, unmistakably and conclusively at the accused. The circumstances cumulatively must be unequivocally consistent with the guilt of the accused and must be inconsistent with any reasonable hypothesis of his innocence. It is only then that you can act on the circumstantial evidence to convict an accused”. That is all the law says.

It is seen, therefore, that the legal issues were confined to three matters - motive, accomplices and circumstantial evidence, not to speak of the presumption of innocence, proof beyond reasonable doubt and the demand made by the law that the benefit of a reasonable doubt must be given to the accused. These are all again commonsense principles based on justice and fairness to be complied with to help the judge to lead the rest of his life in quiet contemplation undisturbed by his conscience. The evidence of Masood Mahmood who is an accomplice, must therefore, be examined and there must be a search for the corroborative evidence. The latter evidence must be tested with the following question:

1. Can Masood Mahmood be believed without any reasonable doubt?

2. Is there supporting evidence from an independent source to corroborate the approver, Masood Mahmood, that Bhutto was a conspirator in the alleged murder?
3. Is the “supporting” evidence of such a convincing nature that the “supporting” evidence by itself convinces us that Bhutto was a conspirator, if Masood Mahmood’s evidence is unacceptable?
4. If, on the other hand; it is acceptable, then, is the “supporting” evidence of such a nature that it supports the accomplice’s evidence on material points incriminating the accused? This is only a requirement of prudence.

It is a matter for comment that hundreds of cases were cited with detailed references to the facts of these other cases. It is sometimes a matter for thought whether justice can be done with so much borrowed wisdom. Has a judge to avail himself of all the King’s cases and all the King’s precedents? No one dare say that citing case law is a bad thing but it must not be overdone. It may lead to straining at gnats and swallowing camels or to miss the wood for the trees. No one will say that toast and marmalade is bad for breakfast. It is excellent but that does not mean that the marmalade should be daubed all over one’s face.

It is not with great respect intended to say anything disparaging of judges. It is said one does not think less of a judge because he has made a mistake nor does one think less of a mistake because it has been made by a judge. What has been expressed is only a view point and, perhaps, a judicial philosophy.

All legal learning must be the unseen foundation for the seen structure of the law which reveals its majesty, its simplicity, its fairness, its justice and its beauty to be appreciated, respected and obeyed by the people. It is this and nothing else that contributes to the Majesty and the Rule of Law. It is not the learning, the pomp and pageantry of the judges. That does not mean that judges need not be learned in the law. It is most essential. It is the unseen foundation of judicial institutions. When the foundation and much of it is seen above the ground, it can only be said that the parties affected by the judgements and the people find it difficult to appreciate or share the knowledge and learning of the judges. It is a good thing when judges share their understanding of the law with the parties concerned and the public.

The understanding of the law and its processes by the people is most important. It is for them alone that the law exists. In early times, God was feared rather than loved. The laws too were feared. The more the people found it difficult to understand the law, the more they were awestruck by the law. But the people now are becoming more inquiring and more rational. God has today to be loved and respected. Likewise, the laws too must be loved and respected. The laws are not some mumbojumbo. They are crystalised commonsense they say. The people want to understand them. No judgements, especially in criminal trials of public interest must be given above the heads of the people. True respect for the law and the rule of law will be more lasting if they co-exist with the

understanding of the law. The presumption that every one knows the law has to be made a reality today.

The case and the issues have been unfolded as best as possible and it is for the public to answer whether the prosecution proved that Bhutto was guilty of the crime, after a fair trial. It has not been an easy task to do this unfolding from the judgements and to find the needles in the haystack which occupied 709 pages of space!

If the answers to the above questions are uniformly in the negative, what is the remedy for the people of Pakistan and the bereaved members of his family? How can they right this deadly wrong? If the answers are not an emphatic and categorical 'yes' even then Bhutto was denied justice. If the answer is an emphatic, positive and categorical 'yes' well then justice has been done and no tears need be shed.

It is not the common run of men alone, it is said, whose deeds are balanced with their bad on the Great Day of Account. When this life's land marks vanish, judges too like ordinary mortals will be helpless as moths having to account for their deeds on earth. The words of Abu Bakr, the great saint and the First Caliph of Islam may be recalled. He said when he saw a dove in the shade of a tree in a garden "Happy Art thou, oh Bird. Thou art not called by God to answer for what thou hast done in this world. Would that Abu Bakr were like unto thee."

CHAPTER I

A BRIEF LIFE SKETCH OF ZULFIKAR ALI BHUTTO

This chapter and the following two chapters have been included for the sake of completeness, and for the greater interest of the reader. The information has been gathered for this and the following chapters mainly from Keesing's Contemporary Archives.

Zulfiqar Ali Bhutto was born on January 5th 1928. He was the son of Sir Shah Nawaz Bhutto. He hailed from a family of Rajputs originally belonging to a Hindu Warrior caste and they later became converts to Islam four centuries ago. They were wealthy landowners in Larkana in Sind. He went abroad for his higher studies. He proceeded to the University of California, Berkeley where he graduated in Political Science. Thereafter he obtained his higher degree with a distinction in Jurisprudence from Christchurch, Oxford. He was for some time a lecturer in International Law in the University of Southampton. He was called to the English Bar as a Barrister-at-Law from Lincoln's Inn in 1953. He returned to his country and practised as a lawyer in the West Pakistan High Court. He was married to Nusrat Bhutto and had two sons and two daughters one of whom was Benazir who was educated at Oxford. She was elected the President of the Oxford Union when she was studying there. She now heads her father's political party - the Pakistan People's Party.

Bhutto entered politics and became Minister of Commerce in Ayub Khan's Cabinet in 1958 and thereafter he served as Minister of Information and Minister of National Resources in 1960. He ultimately became the Foreign Minister. In 1966 having formed the Pakistan People's Party (P. P. P.), he resigned and went into the opposition. The policy of the P.P.P. was to establish Islamic Socialism promising Food, Clothing and Shelter for the people - "*Roti, Kapra and Makan*". It stood for democracy and to end any military dictatorship. It also stood for an independent foreign policy. Bhutto played a leading role in the Student Revolt of November 1968 which was against Ayub Khan's regime. He was arrested and was in prison till February 1969. In the election of 1970 his party won by a large majority in what is now West Pakistan. It obtained its main support from Punjab and Sind winning 81 out of 138 seats.

President Yahya Khan resigned on the 20th of December 1971 after the defeat of Pakistan on the Eastern Front and the ceasefire in the West in the war with India. He was succeeded by Bhutto who formed his Cabinet on the 24th of December 1971. When Yahya Khan resigned, Bhutto was representing his country in the United Nations in the debate on "India's aggression". He was called back and he made a triumphant return to Pakistan. He drove straight to the President's Palace amidst the enthusiastic cheers of thousands of his supporters. He was later sworn in as President and the Chief Martial Law Administrator, Bhutto thus became the 4th President of Pakistan and the first

Civilian President. He held sway in Pakistan as President and later as Prime Minister with a democratic constitution which was introduced in 1973. He was the leader of Pakistan during this period till the promulgation of Martial Law on the 5th of July 1977 when his government was overthrown by General Zia-ul-Haq.

Bhutto's critics were of the view that he contributed to the dismemberment of Pakistan as Mujib-Ur-Rahman's party was the majority party in Pakistan but his supporters hold the view that this was inevitable and Bhutto saved West Pakistan from weakening itself further by the continuation of hostilities. He was, according to them, keen on consolidating West Pakistan into a new Pakistan to introduce a Democratic Constitution which he did in 1973. He stabilised West Pakistan and was responsible for many progressive measures. He nationalized many industries, banking and insurance. He introduced many economic and social reforms, stopped the flight of money abroad and cut down the privileges enjoyed by an exclusive class. He established friendly relations with India, the Soviet Union, China and the United States. He was described as being a dynamic, arbitrary young leader in a hurry. He published a book entitled, "The Myth of Independence". The title speaks for itself.

The events thereafter with the promulgation of martial law in July 1977 led to his trial on a charge of conspiracy to murder his political opponent Kasuri which resulted in the death of the latter's father Nawab Muhammad Khan in November 1974. He was convicted with four others. His appeal was dismissed by a majority judgement of the Supreme Court (4 to 3) and he was hanged in Rawalpindi Prison at 2 a.m. on the 4th of April 1979.

We must also mention that he went to the polls in March 1977 and his party the P.P.P. won by an overwhelming majority but there were allegations that the elections were rigged and a lot of unrest was created in the country ultimately resulting in General Zia seizing power in July 1977. Zulfikar Ali Bhutto made many enemies among the privileged classes with vested interests.

Le Monde commenting on his career has stated, "Mr. Bhutto was disgraced because as an autocratic reformer he had introduced many progressive measures, nationalising large sections of industry and banking, insurance and the agricultural processing industry and had attacked the concentration of economic power symbolically represented in Pakistan by the "the 22 families" which are closely linked with the higher ranks of the administration and the army - the country's principal institution which has held power for most of the time. His social policy, a bold one for a backward country (a minimum wage, health insurance, bonuses and worker's participation, old age pension for workers) made him fiercely hated by the employers, but he made the workers and peasants conscious of their rights. For the latter, the agrarian reform represented a great experiment, for it envisaged a less unjust distribution of landed property, the source of wealth and local power, even though evasion as possible. The fall of the P.P.P. Government endangered the implementation of these reforms. Infinitely more conscious than his predecessors of the realities of the contemporary world, Mr. Bhutto wished to transform the society of his country and spare it a revolution, whereas the two military

regimes which preceded him in power had favoured the development of the private industrial sector and large scale capitalist agriculture with the help of considerable amounts of foreign aid, deliberately increasing social inequality General Zia's policy is not very different..."

CHAPTER II

A PICTURE OF THE EVENTS IN PAKISTAN DURING THE BHUTTO REGIME (1971-1977)

This Chapter as stated earlier had been included to give a rough idea of the main events during the Bhutto regime. The author is no more than a chronicler and acknowledges his debt to Keesing's Contemporary Archives for the information. It has not been the objective of this book to deal with the politics of Pakistan either between 1971 to 1977 or from 1977 to 1979. There has been no study as such of the politics in Pakistan and there has been no first hand information to express any considered views especially to the people of Pakistan who know best with their experience and knowledge of the politics of Pakistan within the last 15 years. This book has, as its main objective, a review of the legal and judicial processes that led to the execution of Zulfikar Ali Bhutto. It would have been incomplete to deal with the trial and appeal *in vacuo* so to say. It is necessary to remind the reader of the main political events that were taking place at that time. No one can deny the political aspects and the political features relevant to the trial. The prosecution alleged that there was a political motivation for the crime. Bhutto alleged that there was a political motivation for the prosecution. In this situation, there must be an awareness of the political events in the country for greater understanding and interest.

Bhutto sent into retirement many high ranking members of the Army and Navy including Yahya Khan who was placed under house arrest. He described most of them as the "Fat and flabby Generals". He replaced the four Military Governors of the four provinces of Sindh, Punjab, Baluchistan and the North West Frontier with civilians. He appointed a Commissioner to inquire into the Pakistan defeat. He abolished the privy purses and privileges of the former princes. He had decided to set up a democracy and introduced many political, social and educational reforms. He pledged that Martial Law would continue but "not one second longer than necessary". He formed a cabinet of talented persons among whom was Dr. Abdus Salaam who won the Nobel Prize for Physics. Dr. Salaam was the Minister of Science, Technology and Production. He appointed Mr. Yahya Bhaktiar as Attorney General who was to later appear for him in the Supreme Court. Many were the changes made, many were those removed from their high posts and perhaps many were the seasonal friends and lasting enemies he naturally made. He commuted all death sentences to life sentences. He abolished whipping and remitted sentences passed by the military courts. He did not draw any salary as President and ruled that officers in future must travel economy class on official business. These ambitious policies and reforms introduced by Bhutto to establish a democracy and to remove entrenched privileges, his policy of nationalization and his desire to achieve all this in a short time led to his earning the hostility of vested interests at home and abroad. He took a perilous course and it is to his great credit that he was able to do so much and survive so long. His policies affected the top ranking generals and officers of the Army but he had to depend on a security force. The Federal Security Force was inaugurated by statute in

1972-73. It certainly became a strong arm of the Government. There was severe criticism against this Force and its Director General and questions arose whether this Force was necessary in the circumstances and how far and how successful the Government was able to control and contain its actions. Bhutto qualified himself, no doubt, for the assassin's bullet with so many out for his blood and destruction but there was a more cruel fate perhaps that awaited him. If the Judiciary conformed to the principles of justice and fairness there can be no complaint. If it had not done so, then the whole judicial system stands condemned. Mercifully, these are questions and issues not for the author to answer but sadly and posthumously for the reader to answer, after the consideration of the case and the main findings in the judgements which are presented in this book.

Quite apart from his reforms programme which was working ahead of schedule he had to face pressing problems and among them were:

- (1) Relations with India,
- (2) Repatriation of Bengalis in West Pakistan and non-Bengalis in Bangladesh,
- (3) Recognition of Bangladesh,
- (4) Repayment of East Pakistan's share of debt amounting to Rs. 900,000,000
- (5) The hangover from Pakistan's defeat,
- (6) The capitalist's reaction to social and economic reforms and land distribution,
- (7) Flight of capital abroad,
- (8) Repatriation of foreign investments of locals,
- (9) Taxation of the rich,
- (10) Elimination of national and international rackets which were bigger than expected,
- (11) Control of basic industries
- (12) Building of a new economy to give the people a new fair deal,
- (13) Guerilla warfare in Baluchistan,
- (14) Problems with Wall Khan and his National Awami Party,
- (15) The demand of the Afghan Government for self determination for Baluchistan and Pakhtoonistan,
- (16) Terrorist activity in the other provinces and the opposition by the Sardars over the control of land ownership,
- (17) The last ditch resistance and struggle of the tribal feudal authorities against reforms,
- (18) The opposition by all vested interests and the fundamentalists,
- (19) The rivalries among "friends" and the hostility of the enemies of the government,
- (20) The resentment of the military old guard and their families, and
- (21) The hostility of foreign collaborators.

These were just some of the problems. Bhutto had inevitably raised a hornet's nest. On the one hand he had the dynamism, the energy, the brilliance, the confidence and the determination to implement the policies of his party and give a sense of dignity to his people. On the other hand it needed the powers of a superman to solve so many problems and introduce lasting reforms. Was he allowing the Federal Security Force to get out of control? Was he creating a Frankenstein Monster? Was all this inevitable? These are questions that arise for examination.

The power of money more often than not overtakes and vanquishes the power of the people. The people are many and their power is diffused. It takes time to harness it. The power of money is concentrated in a few and it is closely knit when the few realize they are losing all their privileges. They have got the means to corrupt and to organize their strategies. This pattern was not different in Pakistan. An assassination of Bhutto would have aroused the people and his martyrdom would have fired the imagination of the people. Was he therefore hanged having been given the bad name of a murderer? If so, it was diabolical.

Further, could Bhutto have carried on with the implementation of his policies for more than five years preserving all the democratic processes of a 5 star democracy, such as the independence of the judiciary, the independence of the press and all the constitutional freedoms? Was that possible? If there was erosion in these areas, whom will history condemn? The man who had a purpose and a vision to give a new deal to his people and who in fact gave there so much within five years in a country without any recent democratic traditions or the few powerful men with money power or gun power who did not want to lose their privileges but wanted a continuation of the oppression and subservience of their people? Did they have a moral right to obstruct and impede, delay and frustrate progress? Were they selfless or selfish? In the same way, was the Government of Bhutto sincere and selfless in their socialist programme? These questions will be answered by history in the near future. Why did Anwarul Haq, he Chief Justice, hail General Zia as a “National Saviour”? Why did the nine judges of the Supreme Court on the 10th of November 1977, after they had taken a new oath on the 23rd of September 1977 which omitted the paragraph with the words that they once swore earlier to, “Preserve, protect and defend the Constitution”, hold that the constitutional and moral authority of Mr. Bhutto’s Government had completely broken down? This was the observation in the Habeas Corpus application presented by Begum Nusrat Bhutto.

Whether they were right or wrong in this observation when they agreed with Anwarul Haq C.J., who wrote the judgement after his appointment as Chief Justice about six weeks earlier, this observation must be examined, but it need not be done in this book. Their order validated the Martial Law regime on the Doctrine of Necessity. They held that since law and order had broken down, the Martial Law regime was a necessity for a democratic regime to be set up again after an early election.

For purpose of this book, it is sufficient to say that it was unfortunate that the Chief Justice had to say all this and then preside in the Appeal Court which heard the appeal of Bhutto. On the question whether justice appeared to have been done, certainly it does not appear to have been done. But the remaining question whether justice was done is still a question open to the people for their answer. They will be the Gentlemen of the Jury.

CHAPTER III

EVENTS IN PAKISTAN AFTER THE PROMULGATION OF MARTIAL LAW (1977-1979)

This Chapter is to aid the reader to relate the undisputed events in the country with the relevant dates with the undisputed events relating to Bhutto's case. This will help the reader at a glance to fix the events in Court in relation to the political context in Pakistan. Here again, it is only a chronicle of the events without comment. It cannot be said that there is no thunder in silence nor can it be denied that silence sometimes can be eloquent.

5-7-1977 Promulgation of Martial Law. General Zia-Ul-Haq, the Army Chief of Staff becomes the Chief Martial Law Administrator.

Officers of the Federal Security Forces including Masood Mahmood, Director General taken among others into custody. He is kept in a Mess at Rawalpindi and later taken to Abbotabad where he was kept till mid August 1977. Main Abbas, Ghulam Mustapha, Arshad Iqbal, Iftikar Ahmad also taken and interrogated along with Ghulam Hussain. They later are made 2nd, 3rd, 4th and 5th accused respectively. Ghulam Hussain later becomes approver along with Masood Mahmood.

14-8-1977 Masood Mahmood addresses Chief Martial Law Authority making a clean breast of the misdeeds of the F.S.F., "ordered by Bhutto".

3-9-1977 Bhutto arrested on charges of conspiracy to murder. Flown to Lahore, Bhutto arrested and in detention.

6-9-1977 General Zia in an interview with the New York Times says that he had personally authorised Bhutto's arrest. States that he had no knowledge of "What type of leader we had. Mr. Bhutto was a Machiavelli in 1977... an evil genius running the country in more or less Gestapo lines, misusing funds, blackmailing people, detaining them illegally and even **perhaps** ordering people to be killed". He speaks of a secret document he has seen.

12-9-1977 Bhutto formally indicted. He maintains he has been "framed"

13-9-1977 Justice Sandani of the Lahore High Court gives bail and releases Bhutto.

15-9-1977 General Zia makes a statement to the Urdu Digest in which he calls Bhutto, "A cheat and a murderer". He also says on the available evidence, he will not be able to escape severe punishment.

17-9-1977 In a Broadcast statement General Zia says that he is giving complete freedom to the judiciary and press. He will hold the general elections, which he promised within 90 days earlier, after the trial of Bhutto. He promises a fair inquiry to Bhutto. He says that the accused will be treated well and the Courts will give them a just trial. They are in custody on his orders, he admits. "Bhutto will be given every opportunity to defend himself and clear his name". Justice and democracy demand it. "His colleagues will be given the same opportunities". "The purpose is to give a verdict on their guilt or innocence before the elections. "The authorities were asked to give their verdicts before that. The inquiries were to start at once.

18-9-1977 Demonstration and protests against arrests in Karachi, Lahore, Larkana and the surrounding villages. Demonstrations in London.

19-9-1977 Demonstration and damage to rail tracks. Flogging of demonstrators by summary military courts.

20-9-1977 Begum Nusrat Bhutto presents Habeas Corpus application in the Supreme Court challenging the orders of arrest of her husband as unconstitutional and illegal.

A Court order for Bhutto to be brought from Karachi to Rawalpindi ignored by the Martial Law authorities.

In the Habeas Corpus application in the Supreme Court the Government challenges the jurisdiction of the Court to question the order made by the Chief Martial Law Administrator.

22-9-1977 General Zia announces that the office of the Chief Justice had fallen vacant as C.J. Yakub Ali Khan continued in office after his normal retiring age. **He was accordingly replaced by Anwarul Haq as Chief Justice.**

23-9-1977 The new Chief Justice takes oath of office with the other Supreme Court Judges omitting the paragraph in the oath laid down in the 1973 Constitution whereby the Supreme Court judges swore "to preserve, protect and defend the Constitution".* The Supreme Court Judges from now on owed no allegiance to the 1973 constitution.

24-9-1977 Bhutto's daughter Benazir under house arrest and Begum Nusrat Bhutto acting Chairman P.P.P. under surveillance.

11-10-1977 The Bhutto Trial commences before a Full Bench of five judges of the High Court of Lahore, Mustaq Hussain C.J., Zakiuddin Pal, M.S.H. Qureshi, Aftab Hussain, Gulbaj Khan JJ.

22-10-1977 Three hour speech by Bhutto in the Supreme Court in support of his petition for his release. If there is no constitution, it reverts to the Indian Independence Act of 1947 and the Federation Units of Pakistan cannot be kept together.

* Reference Keesing's Contemporary Archives

10-11-1977 The Supreme Court dismisses application for Bhutto's release and rejects the submissions about the unconstitutionality of the processes of the law. It holds that the imposition of Martial Law although an extra constitution step was validated by the "doctrine of necessity", as the constitutional and moral authority of Bhutto's Government had completely broken down. The Court took note of General Zia's pledge that elections would be held as soon as possible after the Trials and the Supreme Court expected that this pledge would be redeemed.

Bhutto accuses "a Foreign Power" *i.e.*, the United States of plotting his overthrow. It had first thought of putting up Air Marshal Asghar Khan but had later decided on General Zia "in the saddle" - in a statement submitted to Court. (2.11.1977)

13-11-1977 Bhutto ill. Not brought to Court from jail. Medical certificate produced - suffering from respiratory infection and gastritis, acute influenza with debility and high fever.

Hearing adjourned for **15-11-1977**. But Court points to the provision that it can carry on in the absence of Bhutto as his Counsel is present.

15-11-1977 Prof. Iftikar Ahamad, Secretary of Health, Government of Punjab examines Bhutto and reports that he is ill - acute influenza, temperature, debility with severe nasal and conjunctive congestion.

Awan, Counsel for the appellant, applies for further adjournment on this account till such time his client recovers. Application refused. The Court, however, ordered him to cross examine Saed Ahamed Khan the witness in the box and and to seek instructions from his client.

Bhutto ill, and hearing goes on regardless.

25-11-1977 Bhutto writes to the Superintendent of Jail, Lahore that he is slightly better but cannot attend Court for five hours at a stretch

26-11-1977 Kasuri called by the prosecution for further examination. Defence counsel expresses difficulty to cross-examine the witness in the absence of Bhutto.

Court directs accused to be examined by a Board constituted by it.

27-11-1977 Prosecutor informs Court that Bhutto refused to be examined by the Medical Board as he was not suffering from any organic disease. He only needed rest for a few days. Defence counsel says Bhutto will be able to attend Court on **3-12-1977**.

Between **13-11-1977** and **30-11-1977**, 15 witnesses were examined and cross-examined.

30-11-1977The Federal Security Force disbanded. It is absorbed into the Police Force.

7-12-1977 Kasuri' s cross-examination concluded in presence of Bhutto.

14-12-1977 Bhutto ill again. Proceedings continue in his absence.

15-12-1977 Bhutto appears in Court with a sore throat and with a severe relapse of his colitis and participates in the proceedings.

16-12-1977 England vs. Pakistan Cricket match in Lahore. Begum Bhutto hit by someone in the crowd on the head.

Fighting between the P.P.A. and P.N.A.

17-12-1977 Incident in Court. Court wishes to sit through the winter vacation. Bhutto in trying to draw the attention of his Counsel - used the term "Damn it". Court rebukes him asking him not to use those words against his Counsel in Court.

Bhutto taken out of Court.

18-12-1977 Demonstrations.

Nusrat Bhutto under house arrest. Mass Arrests.

Transfer application by Bhutto. He requests that it be taken during the winter vacation.

20-12-1977 Winter vacation for High Court – **20-12-1977** to **9-1-1978**.

5-1-1978 Democracy Day.

Riots.

9-1-1978 Bhutto's application for transfer dismissed after hearing in Chambers "in camera".

Bhutto cancels his Power of Attorney and instructions to his lawyers.

Bhutto unrepresented thereafter. Takes no part in the proceedings.

24-1-1978 The statement of Zulfikar Ali Bhutto recorded in open Court.

He says he is not presenting his defence but confines himself to two issues -

- (1) Why this trial is taking place? why has this case been fabricated against him?
- (2) His lack of confidence in getting a fair trial and justice.

25-1-1978 Disturbances outside Court.

In camera proceedings in High Court.

31-1-1978 Demonstrations and protests broken up by police. Some demonstrators flogged. Court announces that the proceedings will continue to be “*in camera*” to avoid possibility of disturbance during the proceedings.

18-3-1978 Benazir under house arrest.

All accused found guilty and sentenced to death.

20-3-1978 Thousands demonstrate and protest. Running battles with police.

Bhutto appeals to Supreme Court. **25-3-1978.**

22-3-1978 Lahore Press sealed. The edition of Musawat sealed and distribution stopped after publication of a letter of Bhutto to Bakhtiar describing the military authorities as “*dirty, miserable and stinking men*”.

27-3-1978 Police raid the Musawat’s Karachi office and seize all copies containing reports of Bhutto’s appeal to the Supreme Court.

Foreign appeals for clemency to Bhutto keep flowing in after **18-3-1978** from Egypt, Libya, Tunisia, Algeria, Turkey, Iran, Yemen, U.A.E., Oman, Qatar. Col. Gadaffi warns Zia that he is prepared , to go personally to Pakistan to rescue “his friend and brother in Islam”, Mr. Bhutto. Turkish Premier offers asylum. Appeals from Rumania, Greece, Australia and U.N. Secretary General Kurt Waldheim. British Government and USA silent. Chinese Ambassador’ pleads for Bhutto’s life.

1-4-1978 Flogging of demonstrators.

Supreme Court rejects application of Bhutto for relief from conditions in death row. His counsel, the former Attorney General, described the place as horrible and insanitary. Hearing of appeal fixed for 6th of May and the Court rejects request for two months’ time to prepare case. Later postponed to 20th May.

12-4-1978 Editors of newspapers Sadaqat arrested. Zia observes at a press conference, “One or two more public hangings will bring saboteurs to their senses”.

Elections postponed.

Bhutto’s appeal has commenced.

Pakistan goes on reverse gear now. Former owners get back their rice husking units which had been nationalised. State controlled industrial sectors denationalised. Foreign banks allowed setting up branches in Pakistan. Constitutional guarantees considered

against nationalisation and take over of properties. Favourable atmosphere for investment created.

14-8-1978 President Chaudhury resigns after his five year term. General Zia is sworn as President.

July 1978 - 1979 while Bhutto's appeal is being heard, white Papers are published and distributed both in Pakistan and abroad about all the misdeeds, corruption etc. during Bhutto's regime - also about how he used the Federal Security Force as his personal Gestapo, and also his interference with the freedom of the press and the independence of the judiciary.

Bhutto replies in a statement of 80,000 words submitted to the Supreme Court denying the allegations against him in the White Papers. He said, "We did not flog journalists, nor did we steal the printing presses of newspapers or stop publication of newspapers for a single day."

6-2-1979 Bhutto's appeal rejected. Four judges convicting him while three judges including Haleem J. (later C.J.) acquitted him.

10-2-1979 President Zia announces that Pakistan's legal system will be replaced by the traditional Islamic Code.

Punishment: Lashes, stoning to death, amputation of right hand, amputation of left foot for 1st and 2nd offences and life sentence for 3rd offence. These sentences are for special offences. He introduces the Zakat, a 2.5 tax on wealth to be effective after July.

24-2-1979 Bhutto's counsel presents a petition to the Supreme Court to review its judgement with the request that the two judges who dropped off be recalled. Refused.

24-30-1979 Supreme Court rejects another petition about death sentence. The Supreme Court (all agreeing) stated that the matters in the petition were for the consideration of the executive exercising its prerogative of mercy.

17-3-1979 Malik Ghulam Jilani's petition dismissed. He challenges the de jure authority of the President to deal with mercy petitions and questions the right of the Superintendent of the Prisons to implement the sentence of death before the mercy petition is disposed of by a de jure President.

3-4-1979 Malik Ghulam Jilani's appeal, an inter Court appeal, dismissed. The grant of a certificate to appeal to the Supreme Court refused on the question of the de jure President. There was no time to appeal to the Supreme Court or take the matter up further.

4-4-1979 Bhutto was executed and hanged at the Rawalpindi Prison at 2 a.m. His wife and daughter allowed to see him on **3-4-1979**. Body flown to Larkana in Sindh. Buried there. Wife and daughter not allowed attending the funeral - under house arrest.

Public announcement made nine hours later. Bhutto was not allowed the customary 48 hours between the rejection of the mercy petition and execution. The sentence was carried out 2 ½ hours before the time provided for by prison regulations.

Public announcement after Bhutto's burial in Larkana.

CHAPTER IV

THE KILLING OF NAWAB MUHAMMAD KHAN AND THE AFTERMATH

Half an hour after midnight on the 11th of November 1974, Ahmad Raza Kasuri, an active Member of the Opposition in Parliament and a virulent critic of Bhutto and his government, was returning home in his car after attending a marriage ceremony in Shadman colony in Lahore. The other occupants of his car were his father Nawab Muhammed Ahamed Khan who was seated in front by the side of his son Kasuri who was driving. His mother and sister were seated behind. There were a number of shots fired from automatic weapons and bullets hit the car. The occupants except for Nawab Muhammad Ahmad Khan escaped unhurt. The latter was hit on the head. His son drove straight to the United Christian Hospital and admitted his father to hospital. He succumbed to his injuries at 2.55 a.m. The assailants were unidentified and unknown. Within minutes of the death of his father, Kasuri had in the first information report (F.I.R.) lodged by him asserted that the firing was really directed at him due to political reasons as he was a member of the opposition and was also the Information Secretary of the Tehrik-e-Istaglal which was strongly critical of government policies and that he himself had severely criticised the government. He added that in June 1974, Bhutto had addressed him on the floor of the House, when he had criticised him, thus, "You keep quiet. I have had enough of you; absolute poison. I will not tolerate your nuisance any more." Ahmad Raza Kasuri had retorted, "I cannot tolerate your style also." Bhutto then said, "I have had enough of this man. What does he think of himself."

On the 4th of June 1974, the day after the incident in Parliament, Kasuri moved a privilege motion complaining that he was receiving "threatening calls to face the consequences after yesterday's altercation with Bhutto on the floor of the House."

Kasuri had been a victim of several attacks and murderous assaults by his political enemies who wanted to liquidate him from 1972. There was an attempt to shoot at him in Islamabad in August 1974. He had received information that four or five persons were looking for him. He said his father was an innocent victim.

The crime empties collected at the scene and found at Islamabad after the incident in August 1974 were of Chinese make of 7.62 m.m. calibre. The only two circumstances available for a lead with regard to the shooting in Lahore in November 1974 were,

- (1) the reference to the incident in Parliament on the 3rd of June 1974 with no direct implication that Bhutto was a conspirator.
- (2) the make of the bullets and their calibre being similar to the bullets which were spent at Islamabad. Both these circumstances did not give a meaningful lead to the investigators.

It was unthinkable for any investigator to question the Prime Minister because of circumstance No. (1). The proceedings of the Parliament proved the altercation on the floor of the House. This was more than five months earlier and Kasuri was no stranger to political enemies who had paid attention to him on many occasions earlier. As far as the similarity of the empties, it was found that this sort of bullets was available underground and also was officially issued not only to the Federal Security Force but to other Army units. No interrogations of the officers of the Federal Security Force or other Army units were done. There was a sort of stalemate. With hindsight, we know that it was during a Martial Law regime and it was with all the constitutional guarantees thrown aside that confessions were collected after long periods of indefinite detention and a case was filed against five accused among whom three had made statements fully implicating themselves. One had made a sort of confessional statement and he was made an accused. Two others, Masood Mahmood and Ghulam Hussain, made confessions and became approvers. All these could not have been done in 1974. There is therefore nothing necessarily sinister in the investigators not getting far with their investigations. On the other hand, an independent Tribunal of Inquiry was set up under Justice Shafi-Ur-Rahman, after the shooting in Lahore.

There is no doubt that the Federal Security Force was riding high as a strong arm of the government and it was too much to expect the investigators to probe into the doings of the Force and equally it was too much to expect the members of the Force to cough out their guilt.

In the beginning the Deputy Superintendent of Police, Ahad, was in charge of the investigations. He died in 1975. The case was handed over to Malik Waris of the Special Branch. In October 1975, the case was pigeonholed as untraced.

Nearly three years after the incident at Shadman colony which resulted in the death of the father of Kasuri, two years and eight months to be exact, Martial Law was promulgated on the 5th of July 1977. The Federal Intelligence Agency was directed to inquire into the working of the Federal Security Force, to look into allegations of murder, kidnapping and breaking up of meetings. Many top ranking officers of the Force were taken into custody and among them were (1) Masood Mahmood, the Director General of the F.S.F. (2) Mian Abbas, the Director, Operations and Intelligence F.S.F. (3) Ghulam Mustapha, Inspector in the F.S.F. (4) Arshad Iqbal, Sub-Inspector, F.S.F. and (5) Rana Ifthikar, Assistant Sub-Inspector, F.S.F. and (6) Ghulam Hussain, Inspector in the F.S.F. .

Masood Mahmood and Ghulam Hussain earned their pardon and became approvers and the chief witnesses for the prosecution. Both of them had made confessions. Mian Abbas, Ghulam Mustapha, Arshad Iqbal and Rana Ifthikar also made confessions before magistrates. Bhutto's name was not directly mentioned implicating him in any of these confessions except in the confession made by Masood Mahmood who had been taken into custody on the 5th of July 1977 and made his confessional statement implicating Bhutto nearly 50 days later, over the killing of Kasuri's father nearly three years earlier. **Mian Abbas** was made the 2nd accused at the trial over this killing.

Ghulam Mustapha was made the 3rd accused at the trial. He was an Inspector in the F.S.F.

Arshad Iqbal who was barely 21 years at the time of the incident three years earlier and was a Sub-Inspector in the Force (F.S.F.) was made the 4th accused at the trial.

Rama Iftikar who was also barely 21 years at the relevant time and was an Asst. Sub-Inspector was made the 5th accused. The second, third, fourth and fifth accused were all from the F.S.F.

The 1st accused, of course, was Zulfikar Ali Bhutto, the Prime Minister.

Masood Mahmood and Ghulam Hussain, it was their luck, were made approvers. They too were from the F.S.F. The 1st accused referred to by the High Court in the judgement as the principal accused was the only outsider.

The five accused were charged with conspiracy to murder Rasa Ahmad Kasuri and in the prosecution of which that they did cause the death of Nawab Muhammed Ahamad Khan on the 11th of November 1974.

NOTE

One wonders why so many shots were fired. It was a right-hand-driven car, and the assailants were firing from the right. 24 empties were picked up at the scene. Four men were on the job. The deceased received the fatal injury on the top right side and back of left side of the head. It was a stellate fracture mainly in the frontal parietal region of the skull (para 9 H.C. judgement and para 6 of the Appellate judgement). On opening the abdomen the stomach was found empty.

One wonders why this killing, if entrusted to the F.S.F., should have taken so long and why the killing operation was so clumsy and complicated. Could it be that the assailants did not really intend to kill but fired indiscriminately and were not keen on killing just as it happened four months earlier in Islamabad? If so, they would have been only guilty of causing the death by a rash and negligent act.

Anyway this was not focussed as their defence. This note has no relevance at this point of time. In any case, it remains only as a matter of curiosity and interest.

Did the assailants, *i.e.*, the 4th and 5th accused, fire at random only to satisfy their superiors that they obeyed their orders and without them having any intention to kill? Could it be that only the pardoned approvers, *i.e.*, Masood Mahmood and Ghulam Hussain had murder in their hearts. All these questions perhaps are of less than academic interest today.

CHAPTER V

A SYNOPSIS OF THE CASE

It is proposed in this chapter to deal with a brief survey of the case as a whole and deal with the other four accused, all members of the Federal Force, so that in the latter chapters the concentration and emphasis can be focused on the case against Bhutto.

The prosecution sought to make out that Bhutto “the principal accused” was strongly motivated to enter into a conspiracy with Masood Mohmood the approver to eliminate Kasuri. That is to kill him as the latter had been a virulent critic of Bhutto on the floor of the Parliament and outside. According to Masood Mahmood, although he was the Director General of the F.S. F. he took a back seat and it was Mian Abbas, the second accused, who directed the plan and the strategies to kill Kasuri through the third accused, Ghulam Mustapha, and the approver Ghulam Hussain. The commission of the crime was left to them. The 4th and 5th accused were the gunmen who fired at Kasuri a few minutes after midnight near Shadman Colony. The accused who were about the scene beside the 4th and 5th accused were Ghulam Mustapha, the 3rd accused, and Ghulam Hussain who was fortunate enough to be given a pardon and allowed to play the role of an approver. Mian Abbas was the one who was operating this criminal exercise behind the scene, according to Ghulam Hussain.

The 3rd, 4th and 5th accused in their confessions did not implicate the principal accused. They stood by their statements. They were relying on the defence of compulsion and obedience to superior orders. Their position was that they were compelled to obey their superior officers in the F.S.F., and that they were threatened with violence to themselves and the members of their family. This defence was rejected both at the trial and in appeal. It was submitted on their behalf that their oath stipulated that they, as members of the F.S.F., had to swear allegiance to-the President of Pakistan Mr. Bhutto before the promulgation of the Federal Security Ordinance and the F.S.F. Act, but there was no such oath produced or found in their files. (para. 948 of S.C. judgement) According to their oath taken under the F.S.F. Act they had to obey all commands of their superior officers “even to the peril of their life”. The Court, however, held that such orders must be lawful orders and an order to kill unlawfully is not within the ambit of lawful orders- The defences under the Penal Code, viz, (1) that under section 76, they by reason of a mistake of fact believed in good faith they were bound by law to carry out all orders. (2) that they acted as they did under grave and imminent threat to their lives were rejected by the trial court and the Appeal Court.

These defences, it may be said were rightly rejected but they were attractive defences which stood a very good chance of being accepted. It is not fair to think that these good defences were dangled before them by interested parties. These defences lent themselves to vigorous argument and in the climate and atmosphere prevailing inside and outside

court, it was certainly more relaxing to accept the prosecution case and argue this very plausible defence. This is exactly what the second accused Mian Abbas did much later. On Masood's evidence, he Mian Abbas was the operator, the designer, the planner and the master mind in this criminal exploit and not he Masood Mahmood though he was the Director General. Here was Mian Abbas whose magisterial "confession" was in fact an exculpatory statement except for certain admissions which took him very near the offence. He retracted this confession at the trial. He found that the 1st accused scored no runs even between the wickets at the trial. He realised that the pledge to hold the elections within 90 days was in an ever-receding horizon. He found that the defences taken by the 3rd, 4th and 5th accused were received attentively by the Bench, and he thought these defences were making good headway. He was a tired old man of 65 years. He pleaded his innocence for nearly 18 months and perhaps had a presentiment that his defence hitherto taken remained in square one and had no chance of being accepted. In these circumstances, there was a most surprising development in the course of the appellate proceedings. He submitted a written application to set out his position through the jail authorities duly certified by his counsel. What happened or what could have happened through manipulation is surmise. His counsel made the submission that Mian Abbas, the 2nd accused, now accepted, the prosecution case against him as true and that whatever he did, he did under constant threats of the Prime Minister Bhutto and the Director General, Masood Mahmood. He himself had no motive to kill Kasuri. He took a completely different position. Certainly, it was "in extremis" Was he so frustrated that he thought he could live with a lie but had to die with the truth or was it vice versa? In any case, it could have been a protective defensive measure when he found the world collapsing round him. He perhaps clutched at a straw in a last minute effort to save himself. The majority of four judges had to reject this plea, having rejected these defences in relation to the 3rd, 4th and 5th accused who were minor officers of the F.S.F. whereas Mian Abbas was a Director, and according to Masood Mahmood was the planner, designer, manipulator etc. This was also what Ghulam Hussain testified to. The minority among the appellate judges, however, could not convince themselves that Masood Mahmood was a truthful witness and, in the circumstances, acquitted Mian Abbas along with Bhutto. But in Bhutto's case, conceding the whole prosecution case there was no corroboration of an independent nature implicating him in the crime. We can make the observation that the acquitting judges of the appellate court were more than fair to the 2nd accused, Mian Abbas. Were the convicting judges, both in the High Court and the Supreme Court, more than unfair to Zulfikar All Bhutto? This will remain a question for the reader to answer with the assistance of this book.

CHAPTER VI

A SYNOPSIS OF THE CASE AGAINST BHUTTO & THE MAIN LEGAL QUESTIONS

Bhutto was presented by the prosecution as the one and only arch enemy of Kasuri politically motivated to kill Kasuri especially after the exchange of hot words on the floor of the House on 3rd June, 1974. This was represented as a “threat” which the High Court accepted as such and also the four convicting judges of the Supreme Court. To reproduce the heated words in question:

- A. (i) Bhutto looking at Kasuri when he was crossing swords with him said, “You keep quiet. I have had enough of you; absolute poison. I will not tolerate your nuisance any more”. Ahamad Raza Kasuri had retorted, “I cannot tolerate your style also” Bhutto then said, “I have had enough of this man. What does he think of himself?” Masood Mahmood had been witnessing this episode in Parliament.

A day or two later, according to the evidence of Masood Mahmood, Bhutto sent for him and told him -

(ii) that he was fed up with Kasuri and that Mian Muhammad Abbas knew all about his activities. The latter already had been given directions through the witness’s predecessor to get rid of Ahamad Kasuri. He asked him that he should ask Mian Abbas to get on with the job and to produce the dead body, of Kasuri or his body bandaged all over. He also told him (Masood Mahmood) that he would hold the latter personally responsible for the execution of this order. According to Masood Mahmood he protested against this order saying that it was against his conscience and also against the dictates of God but the Prime Minister lost his temper and shouted that he would have no nonsense from him or Mian Abbas and added, “You don’ t want Vaguer chasing you again, do you?”

- B. Masood Mahmood the approver said that he repeated these orders to Mian Abbas who was not the least disturbed and said he would see to it, and not to worry about it. Mian Abbas also said that he had many reminders about this earlier by the witness’s predecessor. Bhutto himself had goaded him again and again both personally as well as on the green telephone (the secret direct line) about the execution of this order. Saeed Ahamed Khan, the Chief Security Officer of Bhutto, also reminded him.
- C. This witness also stated that Bhutto in July 1974 had asked him during his visit to Quetta “to take care” of Kasuri who was likely to visit Quetta. Accordingly, the witness told M. R .Welch that some anti-state elements including Kasuri were likely to visit Quetta and they should be got rid of. Kasuri did visit Quetta in September 1974 and a day or two before that the witness telephoned Welch on

this matter “to take care of” Kasuri. Thereafter, certain correspondence passed between him and Welch on this subject of Kasuri’s movements. Welch was the Director of the Federal Security Force in Quetta.

It was this witness’s position that he was with the Prime Minister in Multan on the morning of the 11th of November 1974 when he received a telephone call from the Prime Minister that “Mian Muhammad Abbas has made complete balls of the situation. Instead of Kasuri he has got his father killed”. On his return to Islamabad Mian Abbas told him that his operation was successful but it was Kasuri’s father who had been murdered.

- D. The witness said he was summoned again by Bhutto who told him that the actual task had yet to be accomplished. He, however, declined to carry out such orders any more.

With the result that there were threats and attempts on his life as well as to kidnap his children from Aitchison College, Lahore. Several times his food was poisoned at Chamba House, Lahore. Some of his subordinates had been won over and he had seen them lurking at odd places. He asserted that he and his family had no motive or grudge against Kasuri or his father. Witness’s father and Kasuri’s father had been great friends.

Masood Mahmood was taken into custody on the 5th morning of July 1977 after Martial Law was proclaimed. While in custody he addressed a letter to the Chief Martial Law Administrator on the 14th of August 1977 where he made a clean breast of the misdeeds of the Federal Security Force. After further interrogation he made a confessional statement before a magistrate on the 24th of August, 1977. He applied on the 7th of September 1977 for the grant of a pardon which was granted by the District Magistrate of Lahore. After the grant of this pardon he made a detailed statement.

What manner of man was Masood Mahmood? It is sufficient to say at this point that he was a self-confessed criminal who purchased his freedom with his confession relating to the events that took place nearly three years earlier despite all the misdeeds committed by the Federal Security Force of which he was the head. He was certainly having a good time during Bhutto’s regime, living in luxury hotels in his own country and abroad, purchasing spectacles with a hearing aid at state expense and enjoying luxury trips along with his wife during this period. He was described as a ruthless superior officer by a prosecution witness and there was an impressive record of all his misdeeds. He was far too potent for all his misdeeds to be fathered on Bhutto. He said so much against Bhutto after so long. He had to in law and in fact keep to the terms of his obtaining a pardon. As stated in the preface, the law in its wisdom falls in line with prudence, fairness and justice and strongly advises judges, if they have not already advised themselves, that the evidence of such accomplices must not be acted upon without double caution. The law again in all fairness and as a matter of common sense

tells a judge that motive is like the proverbial single swallow which does not make a whole summer. It is inconclusive.

(iii) In this particular case, Kasuri being a politician had many enemies just as Bhutto had. Undoubtedly, Bhutto operating on a larger scene had many more enemies and in that respect Kasuri was just one among a multitude. Kasuri had enemies and his having them in the Federal Security Force was most likely with all the attacks he made about this force both in Parliament and outside. It cannot be said he was not critical of the Director General himself when he attacked this Force nor can it be said his utterances about the Force did not embarrass the Director General. It is unfortunate that in a commonsense picture of the case this factor was ignored in more than one quarter during the trial and the appellate proceedings, when this circumstances stares one in the face, with regard to the Director General of the Federal Security Force having a motive to kill Kasuri.

(iv) Corroborative evidence was sought to be furnished as against Bhutto by two witnesses. Saeed Ahmad Khan, the Chief Security Officer of the Prime Minister and Mr. Welch, the Director of the FSF in Quetta. The evidence of M. R. Welch does not implicate Bhutto in any manner whatsoever. It fails to connect Bhutto with the conspiracy. The evidence of Welch rests on the communication he had with Mian Abbas and Masood Mahmood. His communications with Mian Abbas was a routine report about the movement of Kasuri and other anti-state elements on their visit to Quetta, and the reports sent were routine communications which do not bring Mian Abbas into the conspiracy. But the evidence of Welch implicates Masood Mahmood and brings him into the conspiracy large as life. It was unfortunate that Masood Mahmood no sooner he implicated Bhutto was allowed to slip out as a pampered approver from justice.

(v) A. With regard to **Saeed Ahamed Khan** his testimony that Bhutto somewhere in the middle of 1974 in the course of an interview with him suddenly asked him whether he knew Kasuri and when he said that he did not know him personally, he was asked to remind Masood Mahmood about the job entrusted to him appears to be a typical police touch as it is called by criminal lawyers. It is invariably sensed by judges and lawyers with experience in criminal cases. It is not that it is necessarily false and must be rejected. But such an item of evidence is treated with extreme caution. It was not necessary for Bhutto to remind Masood Mahmood in this manner. It is far too vague and would have embarrassed Masood Mahmood himself if Bhutto being a co-conspirator sent this message pertaining to a very serious matter through Saeed Ahamed Khan in whatever vague manner. Bhutto was in regular communication with Masood Mahmood. He was on the green line and he could have picked up the telephone and reminded him on the secret line. If this was the form of Bhutto's conduct he must have sent innumerable reminders about the job from June to November. This was the time when Bhutto had countless problems and quite a variety of them. It is an inherently improbable story. The message is indefinite and vague and Masood Mahmood is the last person in any case whom we could trust to decode this

message. This is not the corroboration that satisfies the law or one's commonsense and one's sense of fairness and justice in a criminal case. An approver cannot corroborate himself. It is a pure commonsense principle.

B. Through Saeed Ahamad Khan the prosecution sought to corroborate the evidence of Masood Mahmood further by leading evidence of the subsequent conduct of Bhutto.

Saeed Ahamad Khan was also taken into custody with the promulgation of Martial law. It is sufficient for the moment to say that this witness who was the Chief Security Officer of Bhutto does not implicate Bhutto in any manner about anything the latter did or said in relation to the conspiracy. His testimony about the message given to him by the Prime Minister in the middle of 1974 has been already dealt with. His further evidence was that,

(1) In December 1974 or January 1975 he was taken to task by Bhutto for sitting in Rawalpindi when his (Bhutto's) name was being mentioned in connection with this murder of Kasuri's father before the Tribunal presided over by Justice Safi-Ur-Rahman in Lahore. He proceeded to Lahore and contacted the Senior Superintendent of Police and Abdul Ahad was replaced by Waris to overlook the investigation. He gathered that the empties found at the scene were of Chinese make and of 7.62 mm calibre. When he brought this to the notice of Masood Mahmood, he was undisturbed though this type of bullets was in official use by the Federal Security Force. He replied that they could have been obtained underground and they were smuggled into the country.

(2) Bhutto on the other hand, when it was reported to him, wanted him to check with the Defence Secretary who informed him by letter that bullets of this calibre and make were officially issued to the Federal Security Force and to other Army Units. Saeed Ahamad Khan was also asked whether these bullets were available in Bara, a tribal territory and also to make inquiries about Kasuri's other political enemies and about family disputes.

(3) The witness also spoke about the Judicial Tribunal Report which was completed on the 27th of February 1975. The original of the report was sent to Bhutto by the Chief Minister of Punjab with the summary of the findings and they wore to the effect that the shooting in Islamabad and Lahore had a common inspiration, motive and organization and the motive was political and that there was a well organized, well equipped persistent effort to kill Kasuri because of his party affiliation and public utterances. There was a recommendation that a more purposive interrogation should be done from the residents of the area, the invitees at the wedding etc. and about the number of shots fired and the number of weapons used. Bhutto had expressed the view, according to the witness, that the report was adverse and should not be published.

Well, we know that the report was not published. It would have been counter productive to have such reports published before the investigations were complete. The report would have been a private guide to the government and the investigators and not for publication. No responsible investigators publish their lines of investigation. On the other hand, the Chief Minister of Punjab, Mr. Hareef Ramay, sent this report with a covering letter to the Prime Minister which concluded, "I seek your guidance, Sir, whether the report of the Tribunal should be made public."

The original of this report has not been found by the Federal Investigation Agency. The prosecution had proved that the Chief Minister of Punjab had sought the advice of the Prime Minister whether to publish the report and it is known that the report was not published. Under what circumstances this happened was not proved. The Chief Minister who was in the calendar of witnesses was not called by the prosecution because it was alleged he had turned hostile. This was denied by the defence. Mr. Ramay, the Chief Minister, was convicted under the Defence of Pakistan Rules during Mr. Bhutto's regime though his conviction was later set aside as illegal by the Lahore High Court. It cannot be accepted necessarily that Mr. Ramay had turned hostile to the prosecution. Even if it could be so, it does not necessarily displace the commonsense presumption that if called he could have even truthfully said a few things unfavorable to the prosecution.

Moreover, even conceding this evidence, this circumstance does not necessarily implicate Bhutto in the conspiracy. His conduct is consistent with his anxiety, embarrassment and interest in the proceedings of the Tribunal of Inquiry when his name had been unfairly mentioned with an insinuation. The evidence remained at that point in the Tribunal of Inquiry. If Bhutto was unfairly and wrongfully mentioned, he would have naturally wanted the investigation to positively go in the correct direction. The bullets were officially issued to the Federal Security Force and other Army Units. They were available underground. If the investigation went in the direction of the Federal Security Force without pursuing the other possibilities, *i.e.*, the availability of the bullets underground and in the other Army Units, it would have embarrassed the government and himself despite his own innocence. This may be a reasonable hypothesis and explanation for Bhutto telling Saeed Ahamad, "Keep the FSF out", if he did say so at all. There were many other political enemies of Kasuri!

- C. Saeed Ahamad also testified to the fact that he opened a file on Kasuri even as far back as 1973 before the 1974 Lahore murder. But files were opened with regard to many other political opponents. He also spoke about the strenuous efforts made by Bhutto to win over Kasuri. In the first place, there is nothing wrong for a politician to win over his political enemies. In the second place, Saeed Ahamad's evidence and the observations on this question by the convicting judges of the High Court and Appeal Court are open to much criticism.

Bhutto, according to this witness, instructed a strict surveillance on Kasuri particularly after the killing of his father. This again is natural when Kasuri went about saying openly that he would take revenge on Bhutto.

We see, therefore, Saeed Khan's evidence, even if totally believed about Bhutto's subsequent conduct and interest in the investigation, is consistent with his innocence. It may well be the conduct of a man in the position of a Prime Minister who was embarrassed by the unfair suspicions of his political opponent without any evidence whatsoever. Even when Kasuri gave evidence at the trial he had no evidence for his suspicions. It was nothing more or nothing less than an insinuation and as far as Kasuri was concerned, he had no material except the words used by Bhutto against him in Parliament on the 3rd of June 1974.

To sum up the case against Bhutto, as presented by the prosecution, it rested on a tripod, so to say, besides the evidence of Kasuri who provided the motive evidence. The main leg was the evidence of Masood Mahmood, the approver. The second leg was really no leg at all and that is the evidence of M.R. Welch, and the third leg the evidence of Saeed Khan, was shaky and infirm. The prosecution case, at the highest, stands on two legs really propped up by the motive evidence given by Kasuri.

CHAPTER VII

THE CLASSIFICATION OF THE EVIDENCE AGAINST BHUTTO AND COMMENTS

The contents of this Chapter may include observations which may be repetitive but it may also be helpful to the reader to recapitulate the items of evidence and reconsider what has been repeated for the sake of emphasis and stress.

The prosecution led the evidence of 41 witnesses and many documents to prove,

1. The strained relationship between Bhutto and Kasuri resulting in the threat extended on the floor of the House on 3-6-74 by Bhutto.
2. The conspiracy to murder Kasuri between Bhutto and Masood Mahmood and the joining of the other accused and Ghulam Hussain, another approver, beside Masood Mahmood.
3. Attack on Kasuri as part of the same conspiracy firstly at Islamabad and later in Lahore, which resulted in the death of the deceased.
4. The steps taken by Bhutto and his subordinates to channelise the investigation in a manner so as to exclude the possibility of detection of the actual culprits. The interference in the investigation of the provincial police by the central agencies.
5. Preparation of incorrect record by the police under the direction of the officers of the Central Government with the object of diverting the correct line of investigation.

It can straightaway be said that the evidence in relation to the Islamabad shooting does not really touch Bhutto in any manner, nor all the evidence led on the preparation of incorrect records. Item No. 1 refers to evidence which may be classified as **motive evidence**. Item No. 2 refers to evidence of the **conspiracy** implicating Bhutto, and the sole witness is Masood Mahmood who virtually purchased his pardon with his confessional statement made after being in solitary confinement for a considerable period. He is a self confessed participant in the crime. It may be classified as the conspiracy evidence. Item No. 4 refers to the evidence of the **subsequent conduct** of Bhutto. It may be classified as subsequent conduct evidence. The only witness being Saeed Ahamad Khan.

Justice Haleem, now the Chief Justice of Pakistan, who was one of the three judges who acquitted Bhutto in appeal, observed there were two limbs to the supportive evidence to the evidence of the approver - one is furnished by Saeed Ahamad Khan and the other by M. R .Welch. The judge also observed that M. R .Welch has not implicated Bhutto at all in what was conveyed to him at Quetta in July 1974 by Masood Mahmood. His evidence

fails to connect Bhutto with the conspiracy. It only furnishes corroboration to the evidence of Masood Mahmood that there was a conspiracy. That there was one is common ground in the totality of the evidence. But what is to be concerned about is the supportive evidence, if any, to connect Bhutto with that conspiracy. Therefore, it is not far wrong as stated earlier that this was no leg at all. It is a broken limb which does not support the prosecution's case against Bhutto.

1. Dealing now with the motive evidence and the witness Kasuri, the prosecution has certainly proved that there was no love lost between Bhutto and Kasuri. He was a virulent critic, both in and out of-Parliament. He was one of the many political enemies of Bhutto and Kasuri himself had many enemies besides Bhutto. What was the "the threat" extended to Kasuri, to use the words of Anwarul Haq, C.J., in his judgement in appeal? Was it a correct way of interpreting this episode on 3-6-74 in Parliament? These are the words: "You keep quiet. I have had enough of you; absolute poison. I will not tolerate your nuisance. What does he think of himself?", and Ahamad Kasuri retorted, "I cannot tolerate your style also". Do these words and the whole episode give a necessary impression that there was "a threat" "extended" to Kasuri to kill him by Bhutto? Does all this lead to the necessary inference that following this incident Bhutto had ill-feelings which necessarily meant that he had a motive to kill Kasuri, and therefore, he entered into a conspiracy with Masood Mahmood?

Certainly, Kasuri was a political enemy of Bhutto. It will be a very uncommon and unique leader who has no political enemies. Bhutto definitely was not that unique uncommon political leader. Indira Gandhi was not that. Nehru, perhaps, was. General Zia is not that nor is Rajiv Gandhi. This does not mean that if one of their political enemies is killed, each one of them is the killer, as the case may be. The killer in this case may have been one of the members of the security force who may have acted on his own without a manifest motive or he may have been instigated to do so by the head of his Force. On the other hand, it would be normal human conduct for the relatives and friends of the victim to suspect the political leader if, as known in this case, Bhutto's party supporters had many incidents of violence with Kasuri earlier. The unintended victim died on the 11th of November 1974. Kasuri survived to avenge his father's death. It is known from Privilege Motion he moved in Parliament on the 9th of July 1974 that he had a number of abusive calls on the night of the 3rd over the incident in Parliament. Worse things have been said in Parliament. As Bhutto himself said, he would not have over this comparatively trivial incident drawn his sword. Prime Ministers in England have lost their tempers with their critics. Even Abdul Wali Khan had shouted in Parliament at Abdul Hafeez Pirzada that he would wring his neck and shoot the Prime Minister. The Speaker, however, expunged the words.

As an English Judge always directed the Jury, "Gentlemen, it is common for husbands to swear and curse at their wives and wives to swear and curse at their husbands. Do not take that into serious consideration as a motive to decide who is the killer of the wife or who is the killer of the husband". Very often hard feelings expressed in hard words cool tempers. Anyway, no one who has a sense of responsibility goes on a killing campaign after "a threat" made public in Parliament even if this incident can be called so!

When Kasuri referred to this incident with Bhutto in the early hours of the morning of the 11th of November soon after his father died, he was naturally emotional and indignant at this unprovoked assault. His father was the unintended innocent victim. He did not identify or know who the assailants were nor who the instigators were. He was not wrong to understand that it was politically motivated. He had every reason to suspect that it was a P.P.P. (Pakistan People's Party) instigation. He had been a victim of violent attacks by P.P.P. supporters. He had received abusive nuisance calls from P.P.P. supporters on the 3rd of June, 1974. He could not have mentioned any particular member. It was not surprising therefore that he referred to the political motivation and the incident of the 3rd of June 1974 in Parliament. What else could he say but this much in his emotional and disturbed state of mind without any further clues or information? He never gathered any thereafter. The content of his evidence always rested there.

At a moment like that, his only identifiable enemy was Bhutto among his countless unidentifiable enemies. Were Kasuri's feelings abiding? After the middle of 1975 on the evidence led by the prosecution witness Saeed Ahamed Khan and Kasuri and the documents produced, we find that Kasuri was seeking an audience with Bhutto, he was making overtures to come back to the P.P.P., and he was selected as one of the Parliamentary delegates to go to Mexico. Bhutto gave him an audience only many months later. Then he applied for nomination as a P.P.P. candidate for the election of March 1977 which he failed to get. Bhutto had not forgiven him evidently for mentioning his name in reference to his father's murder. Could all this have happened after the middle of 1975 if Kasuri's suspicion about Bhutto having been in the conspiracy was abiding? Was it not just a natural statement made because he was angry with the P.P.P. and its leader?

It is now known that the murder was a one hundred percent FSF exercise. Why should the FSF engage in the exercise if none of the accused officers and the approver, Masood Mahmood, had any motive to kill Kasuri? So the convicting judges of the High Court thought that Masood Mahmood's evidence is corroborated by this circumstance, that is to say Bhutto's political enmity towards Kasuri. On the other hand, can it be said convincingly that on the prosecution evidence a motive on the part of Masood Mahmood could be excluded? A Prime Minister in power has many seasonal friends whose self interests are identifiable with the power and position of their Prime Minister. There are no exceptions to this rule in the cases of the Prime Ministers and Presidents in South and South East Asia. It pays them to be loyal to the man and the party. They know that the fall of the Prime Minister and his party spells disaster for them and their fortunes. In many cases it is the loyalist and the self interested time server who raises his sword when the star to which he has hitched his wagon is assailed. The leader may disapprove of this action but when the action is complete, he may even protect the sword raiser lest he rock the boat. If he does protect even that does not necessarily mean he had given the orders to his loyalist to draw the sword. As Sir John Koteiawela, a one time Prime Minister of Sri Lanka, observed, "God, save me from my friends. I know how to look after my enemies". Kasuri had very often attacked the doings of the Federal Security Force. One year before the Lahore killing he had said something like this about the FSF: "This Force has been

created to check the processes of democracy in Pakistan. This Force has been created to dislodge the opponents of the Government”. A month or two before the killing at Lahore, at a meeting and a tea party held in Cafe China, Kasuri criticised the Government and said it was oppressing the people and using the FSF to lathi charge and shoot people. These reports were sent from Quetta to the Director General, Masood Mahmood. The FSF has on many other occasions been the target of his attacks and it was most certainly a reflection on the Director General. On the other hand, Kasuri was attacking Bhutto for the misdeeds of the FSF. A politician of the calibre of Bhutto perhaps would have found fault with Masood Mahmood if he had not done it already for the excesses of the FSF. It would have lost popular support for him. But Masood Mahmood would not have been disturbed as long as he had the protection of the government. But if these attacks on the FSF continued, the top man could have even been removed. Governments have been known to do this. Governments have also been known not to do this. In any case, the responsibility for the misdeeds of a government functionary may ultimately be the government’s but the heads of the government need not necessarily share his criminality. If that were so, innumerable heads should have rolled in the history of countries.

These were the political and social realities in Pakistan. In these circumstances, Masood Mahmood was not someone who could not have had a motive to eliminate Kasuri. The words “eliminating” anti-state elements were his when he spoke to M.R. Welch. If he could have spoken to Welch, the Director, FSF, whom he did not know too well in this manner, he could have spoken like this to Ghulam Mustapha, Ghulam Hussain, Arshad Iqbal and Rana Ifthikar directly or indirectly to set upon this “elimination” exercise. If Bhutto had known about it, would he have encouraged it or rather stopped it? Would he have caused all this embarrassment to himself and the government? Would he not have stopped it rather than prodded the FSF in this elimination exercise? Bhutto playing a part in this elimination exercise of Kasuri would have made him, as it did, the obvious suspect. Would Bhutto, the intelligent man he was who depended so much on popular support, have participated in any exercise to make Kasuri a martyr and himself an obvious suspect? These are questions that a Defence Counsel would have asked a Jury. It must not be forgotten that according to Mian Abbas, Masood Mahmood was always dabbling in politics and harassing politicians. After the promulgation of Martial Law Milan Abbas presented a list of all his misdeeds. When Welch was asked why he did not refuse Masood Mahmood when he ordered him to eliminate Kasuri, his answer was that he preferred not to cross him but to keep quiet and do nothing about it. “Anyone who had served with Masood Mahmood could, realise that the better discretion would be to keep quiet than to contradict. In case I opposed his suggestion,’ would have forced him to take action against me so that what he told me would not leak out.... at the time when (the conversation about Masood Mahmood’s order to murder Kasuri) it took place.... If I had acted otherwise, he would have dubbed me as an officer disloyal to Pakistan and would have initiated action against me for that reason.... I had no fear regarding my life but Mr. Masood Mahmood could have instigated a case against me so that I did not divulge what he talked to me. And If I did, I would not be believed.” According to Welch he was not afraid perhaps of his life which meant that he was not afraid to die and be killed by the Director General but he feared Masood Mahmood would have brought false charges against him if it suited him. What a horrible picture and what an evaluation of the arch

approver drawn by another prosecution witness. Well, so much for all the motive evidence led. In law motive is inconclusive. In all these circumstances, could it be said that the prosecution proved a motive exclusively on the part of Bhutto to kill Kasuri on the motive evidence it led, and further was it proved beyond reasonable doubt?

As referred to earlier, it is revealed that the hostile attitude of Kasuri after the middle of 1975 was cooling towards Bhutto. Saeed Ahamad Khan claimed the credit for this change. According to him, Bhutto wanted him and Bajwa, his assistant, to win over Kasuri and bring him back to the PPP. So they proceeded to advise him that he, Kasuri, had a political future and for his own sake and security he must stop oppressing Bhutto and get back into his fold. At last they succeeded, they claimed, and Kasuri meek as a lamb for his protection and safety made a pretence of a change of heart. So according to Saeed Ahamad Khan, it was Bhutto who went to Kasuri and it was not Kasuri who went to Bhutto. If Bhutto went to Kasuri, there was nothing wrong for a seasoned politician to win over his political opponent who was going about accusing him of having killed his father. No one especially in Bhutto's position would have liked an accusation or rather an insinuation of this sort, whether it was true or false. If Kasuri went to Bhutto again, there was nothing wrong or incriminating for Kasuri to get back to the PPP. There was nothing sinister in this reconciliation even if it is assumed that it was a pretence on the part of Kasuri. Would Kasuri, if his suspicions were abiding, as a politician with a future, have gone back to the PPP like a prodigal after he said so much against its leader unless he was genuine? What could have been the political future for a man when he does such a somersault as to fall on the lap of a leader who he had published to the world was his father's murderer? Would Kasuri, if all this was a matter of expediency and a self protective pretence have gone so far as to write to Bhutto from Mexico when he had gone on a Parliamentary delegation thus, "We found that your image as a 'Scholar Statesman' is emerging and getting wide acceptance." Was this a pretence? Was all this necessary in an exercise of pretence? Is it consistent with an abiding suspicion? On the other hand, the judges of the High Court and the four convicting judges of the Supreme Court were quick to accept Kasuri's position that it was all a pretence without any doubt. There was another letter written by the supposed "pretender" on 30th of January.

"My dear Prime Minister,

Earlier I have requested over half a dozen times to your M.S. for an interview with you but to this date I have not received any reply from him. I wonder whether Major General Imtiaz Ali ever made it known to you? I am taking this liberty to write to you and to request you personally to kindly grant me an interview at your earliest convenience. I have to discuss many matters which concern the party and the Government.

You will be happy to know that I have gone to Law Profession as a whole time. Pray for my success and well being.

I met Mr. Abdu Hafiz Perzada on 25th of this month in Lahore and had a detailed talk with him. I hope he must have informed to you about that.

I trust that this letter finds you and Begum in best of health, happiness and prosperity.

With warm regards

*Yours sincerely
Ahamad Raza Kasuri.”*

Bhutto noted in the margin of this letter, I will see him when it is convenient. Please return this letter after you have noted my remarks”. It may be mentioned that Kasuri asked for an audience with Bhutto from the middle of the year 1975. He was granted an interview only in March 1976 and he rejoined the PPP in April 1976. Bhutto it was who was dragging his feet. The National Assembly of Pakistan had been dissolved on the 7th of January 1977 and the country was going to have the general elections in March 1977. Kasuri was later on asking for nomination as PPP candidate. Why should a prodigal pretender be asking later for party nomination from a leader whom he suspected as having been his father’s murderer?

The report in evidence was that Kasuri wanted an audience with Bhutto in 1975 about the middle of the year. The note says about Kasuri’s realisation that his future lay with the PPP and he wanted an audience. There is also in evidence that this audience was given to him only in March 1976. This is undisputed. It is the prosecution evidence that Bhutto was not disposed to give an early audience. In fact Kasuri got his appointment about 8 or 9 months later in March 1976. Therefore, it was not a case of a prodigal “pretender” being embraced with open arms by Bhutto who was afraid of the prodigal’s suspicions and insinuations.

This was a report to Bhutto from Saeed Ahamed Khan that Kasuri wants an audience with Bhutto and he feels his future was with the PPP etc. This document P.W.3/16/D was admitted but the endorsements were objected to when the defence wanted to produce the two endorsements there made by Bhutto which is as follows:

“He must be kept on rails. He must repent and he must crawl before he meets me. He has been a dirty dog. He has called me a mad man. He has gone to the extent of accusing me of killing his father. He is a lick. He is ungrateful. Let him stew in his juice for some time.

*Z.A. Bhutto
29/7*

2. *Please file*

*Z.A. Bhutto
29/7”*

This document with the endorsements was a photostat because the original was not traceable in the P.M.'s office. Saeed Ahamad Khan identified his signature on his note and also his handwriting. He also identified Bhutto's signature and writing in the endorsements. The High Court, however, held that these endorsements were inadmissible since the defence had not summoned the prosecution to produce this document under section 65 of the Evidence Ordinance. But most surprisingly the High Court went on to comment that the first endorsement is not consistent with the second endorsement and that it is not possible to reconcile the first and the second endorsement and these endorsements are clearly a forgery (vide High Court judgement para 565). The High Court made a positive finding which was very much prejudicial to the defence in relation to the contents of a document which they held to be inadmissible. To place it at the lowest, are all their findings all that clear? It is open to the people to form their views. What is irreconcilable with the first and second endorsement, the latter of which only says, "Please file"? Is reconciliation all that "Impossible"? Is it all that clear that it was a forgery and a fabrication? Strong words and strong findings on matters which are quite consistent with Bhutto's reluctance to give Kasuri an audience for 8 or 9 months and his admitted endorsement in the marginal note to the letter by Kasuri on 30th of January referred to earlier. The High Court erred when it overruled the photostat copy on the ground that the prosecution was not summoned to produce the original in the P.M.'s office. It was pointed out by the defence in the Supreme Court that the prosecution was in fact summoned to produce the report of Saeed Ahamad Khan but the document was not traceable. It could be that the document was lost or suppressed. In fact, there was a better reason for the High Court to arrive at a finding that the document was suppressed by the prosecution than to find that the endorsements were forged by the defence. But either finding would be unfair to either side respectively. One wonders why the High Court was so quick to arrive at this finding against the defence. As already stated, the defence in the Appeal Court pointed out that there was an application made to summon the prosecution to produce this document. The Supreme Court accepted the position but unrelentingly the four convicting judges agreed that since the evidence was that what was produced PW3/16/D was a photostat of the original and this photostat was produced from the PPP Secretariat, they held that the views of the High Court were correct, (vide judgement of Anwarul Hag, CJ., para 646) They held that there seems to be substance in the prosecution's submission that these endorsements appear to have been written at some later date. The four convicting judges of the Supreme Court virtually put the cart before the horse and even before they looked for corroboration for the testimony of Masood Mahmood, a self confessed participant in the case, begged the question and made a finding contrary to the rules of prudence, fairness and justice by holding that they have reached the conclusion that "the learned judges of the High Court were right in holding that the appellant Zulfikar Ali Bhutto had a very strong motive to do away with Ahamad Raza Kasuri owing to violent political differences and the manner and the language in which Ahamad Raza Kasuri gave vent to his views against the former Prime Minister and his policies." In other words, it would have surprised them if Bhutto did not turn out the conspirator as testified to by Masood Mahmood. These four convicting judges of the Supreme Court continued to arrive at this interesting finding: "The cumulative effect of all the documents taken together is that the initiative to win back Kasuri was undoubtedly taken by the appellant Zulfikar Ali Bhutto entrusting the assignment to Saeed Ahamad

Khan and his assistant Bajwa.” The judges did not consider the possibility of security officers and others interesting themselves in this reconciliation for various reasons including their own self interest. They ignored all the circumstances which pointed to Bhutto’s reluctance to forgive Kasuri. It is not unlikely that Masood Mahmood a political debbler and a tyrant in his time of power was not a passive spectator in all this. As far as Bhutto was concerned, if as the High Court and the majority in the Supreme Court in effect held that it was Bhutto who went to Kasuri and not Kasuri who went to Bhutto, why was there a delay of eight months to grant Kasuri an interview? Why did Bhutto not have the time to meet Kasuri even on the 30th of January 1976? Why was Kasuri refused PPP nomination? Could Kasuri have sought PPP nomination for the general elections of 1977 if he still suspected Bhutto and was only pretending? These questions never appear to have disturbed the convicting judges of the High Court and Supreme Court. These questions may disturb the people if they are placed before them. Far from raising doubts, the views of these judges contained positive terms like “undoubtedly”, “clearly”, “It is clear” and “It is not possible”. These terms are more appropriately used by sort of crystal gazers than by judges in these circumstances.

2. The evidence of subsequent conduct rests on the evidence of Saeed Ahamed Khan about whose evidence some comments have been already made.

He does not implicate Bhutto in any sense with the conspiracy. His evidence is confined to (1) the part played by the witness on the instructions of Bhutto in the investigations and the attitude and interest shown by the Prime Minister. (2) the surveillance on Kasuri and (3) the winning over of Kasuri and the alleged instructions of Prime Minister Bhutto. At the outset, the totality of his evidence even totally conceded does not implicate Bhutto in the conspiracy. The acquitting judges of the Supreme Court treated this witness as an accomplice. For purposes of Bhutto’s defence, however, it was not necessary to show him up as an accomplice needing corroboration. However, Saeed Ahamad Khan also was one of those who had been taken into custody on the 5th July 1977 and had been detained for several months. We have referred to the finding of the judges of the High Court and the convicting judges of the Supreme Court who have had no doubts that, “The cumulative effect of all the documents taken together is that the initiative to win back Kasuri was undoubtedly taken by the appellant, Zulfikar All Bhutto...”. What are these documents and what are their contents?

(a) Saeed Ahamad Khan reports on 29th July 1975, “Mr. Ahamad Raza Kasuri, MNA, has had number of meetings with me, the last one being at Rawalpindi on 28th July 1975. He had realised that his future was with the PPP. On the Qadiani issue, he says the attitude of Air Marshal Asgar Khan has been lukewarm. Mr. Ahmad Raza Kasuri has requested for an audience with the Prime Minister at his convenience.”

Saeed Ahamad Khan as Chief Security Officer had to send political intelligence reports on the Prime Minister. His sending reports referred to in this chapter was a matter of routine. Does the above report indicate anything to suggest that Bhutto initiated negotiations? Did he give an audience to Kasuri? No.

(b) The second report dated 29th September 1975 states, “Mr. Ahamad Kasuri, MNA now claims to have sobered down and become stable. His rough edges have been chiselled out, his political horizon has become clearer and is a progressive being. Mr. Ahamad Reza has categorically stated that he wishes to return to the fold and carry out Prime Minister’s directive and can be used in any way desired by the Prime Minister. He is prepared to take a head - on confrontation with Khan in the Punjab. He is quite conscious of the fact that his lone vote in the National Assembly for the Government could not be of much consideration but as a demagogue and a student leader with a feudal lobby he can be a common denominator and can be utilised as such.... There is a case pending against him. Sardar Izzat Hayat and Zafar Ali Shah, member of the Rawalpindi Bar, and others in the Court of Malik Muhammed Rafique, 1st Class Magistrate, on the charge of having removed the Pakistan flag from the car of the State Minister, Jamalder and the next date fixed for nearing is 20th of October 1975. He obliquely hinted that this case may not be pursued and his harassment and that of Sardar Izzat Hayat may be stayed. He is still anxiously waiting for an audience with the Prime Minister.” Bhutto’s reaction was again indifference; no audience was granted.

(c) The 3rd report was dated 25th November 1975. It was from Bajwa, the assistant to Saeed Ahamed Khan. It states, “Ahamad Raza Kasuri said he did feel that he is very much sobered now and wanted to co-operate with the Government but he suspected that some third agency which did not like these moves wanted to create a gulf.... Ahamed Raza Kasuri said that he may be given some guidance by the Prime Minister and he will act accordingly but so far he has not been given an audience.” Bhutto does not give him an audience and there was no response.

(d) On the 5th of December 1975, Saeed Ahamed Khan sends another intelligence report. It reads, “As per instructions I met Sardar Izzat Hayat, formerly of Tehrik-e-Isteglal on 4th December 1975. He was most anxious that Mr. Ahamed Raza Kasuri, MSA, be given an audience with the Prime Minister.... He has assured me that Ahamad Raza has sobered down, his edges rounded off and is keen to rejoin the PPP together with his band of supporters and workers..... he is determined to rehabilitate himself and work as a close associate of the Prime Minister. Ahamad Raza Kasuri is being pestered by the opposition parties to join them... but again begs that he may not be kept on tenterhooks any more but be brought to the fold of the PPP without further delay and assures complete loyalty to the Chairman. The irritants created by the vested interests at the move of Ahamad Raza Kasuri joining the party be kindly set aside since the negotiations with him have now been carried on for the past 6 months with no results so far.” This report too had no response and no audience had been given by Bhutto. These reports have been marked as seen by the Prime Minister. The report of the 5th of December referred to above was one which had a note by Bhutto.

“I will see Ahamad Raza Kasuri in Pindi.” Evidently, Bhutto was in no hurry for the return of the prodigal and he was putting off giving Kasuri an audience.

Then there is the letter of 30th of January written by Kasuri himself to Bhutto referred to earlier in which he informed him that he has gone back to the profession and asking him

for Bhutto's prayers for his success and sending him his warm regards and asking him for an early audience. He hoped Bhutto and Begum were in good health. Even on this letter the endorsement made by Bhutto was, "I will see him when it is convenient. Please return this letter when you have noted my remarks". Was this the conduct of Bhutto if he initiated the negotiations to win over Kasuri? Does it not look as though the security officers were trying to, on their own, arrange an audience much to the annoyance of Bhutto? The interview was given only in March 1976.

Well, let us go back to the two endorsements referred to in the document PW 3/16D which contained Bhutto's Endorsement on a note which contains a request for an audience to be given to Kasuri, "He must be kept on rails". In the report of Saeed Ahamed Khan in January there is a reference to Kasuri requesting that he be not kept on tenterhooks anymore. In other words, Kasuri was kept on rails and on tenterhooks. Why were the judges of the High Court and the four convicting judges so positive to hold that the endorsements on the 29th of July were a forgery? Why were these judges so certain from all these documents that Bhutto it was who went to Kasuri in the teeth of all these reports? The question again arises if all this is placed as subsequent conduct of a guilty person, could not the same circumstances have been the conduct of an innocent man who was outraged by the unfair insinuation that he was a murderer rather than being intimidated and influenced by a sense of guilt? Even the finding does not conclusively incriminate Bhutto - at the highest.

Much time has been devoted on these items of evidence and the findings to show how the judges of the High Court and the four convicting judges of the Supreme Court seem to have arrived at certain conclusions with which it is rather difficult to agree. This is a small matter. Hardly anything turns on it but it is a concrete instance where the judges could have been fallible, to say the least.

(e) Saeed Ahamed Khan testified that when he asked the Prime Minister whether he was to produce the letter sent by the Defence Secretary that similar calibre bullets of Chinese make were in official use of the Federal Security Force, the Frontier Corp Units and the Armed Corp Tank Crew, Bhutto is supposed to have lost his temper and said it need not be produced and shouted out whether he had sent him to safeguard his interest or to incriminate him. He warned him, "Not to be over clever and suffer the consequences his progeny will not forget". This witness also spoke of the strict surveillance kept on Kasuri. There was a surveillance on many others and it would have been surprising if no surveillance was kept on Kasuri who was openly vowing vengeance on Bhutto and his party for his father's death.

Saeed Ahamed Khan was rather obliging to the prosecution when, contrary to the documents and circumstances, he wanted the court to believe that Bhutto had assigned to him the task of winning over Kasuri. For all his trouble as he claimed to act in the interests of Bhutto, he was compelled to admit in cross-examination that he was demoted by Bhutto in 1977 and was under a cloud thereafter. He also admitted that his brother had been removed from service on Bhutto's orders. He had been detained for some months by the military authorities who had seized about a thousand files concerning him. This

witness' evidence in court that Bhutto had asked him to keep the FSF out finds no mention in his earlier statements. He made material omissions in his earlier statements with regard to his conversations with Bhutto.

We must remember Bhutto was more than aware that he had many enemies owing to his policies of land reforms, nationalisation etc. There was an attempt on his life by a Baluchi student somewhere in September 1974. The FSF was an important arm of the government. Bhutto's instructions to Saeed Ahamed Khan was to help the investigation and keep him informed. Masood Mahmood who was admittedly in the conspiracy could have kept Bhutto off the scent. Bhutto got confirmation from the Defence Secretary that the type of bullets used were officially used not only by the FSF but they were officially used by other Army Units. Bhutto was naturally interested in the investigation. If he was innocent he would have welcomed the investigation to speed up and send a positive report. If Saeed Ahamed Khan is to be believed, was it not possible that Bhutto would have lost his temper at the witness when he wanted the Defence Secretary's letter about the availability of 7.62 mm bullets of Chinese make in other units? This letter was helpful to the FSF and it was addressed to the Chief Security Officer of the Prime Minister. It would have been an awkward interference with the investigation if this letter was produced from the Prime Minister's office.

It was understandable even if Bhutto was interested in shadows not falling on him when he was innocent. If the 7.62 mm bullets of Chinese calibre were used officially by the FSF only and if these bullets were not available underground, then it would have been a pointer only against the FSF and an inquiry should have been pursued. But this circumstance as it stood then was equivocal.

Kasuri's complaint on the 11th of November 1974 soon after his father's death was not helpful to the investigators. The assailants were not identified. Even if the most improbable thing happened and the investigators dared to interrogate the Prime Minister, he would have admitted the incident in Parliament which was by no stretch of imagination "a threat extended to Kasuri". If the Prime Minister was questioned he may have lost his temper and even said, "I am sorry, this fellow was not killed and his poor father was killed". All this means nothing. If the Prime Minister was told 7.62 mm bullets of Chinese make were officially issued to the FSF, he would have even questioned Masood Mahmood who, guilty as he was, would have said, "These bullets are officially issued to many Army Units". So the investigation would have remained in square one and have made no breakthrough. Where then were they to begin? We now know that the further development in the investigation was after the promulgation of Martial Law and how the "beans got spilt" and the "cat was out of the bag" when Masood Mahmood made his confession and statement after many days of solitary confinement with many complaints hanging over him. He let the cat out of the bag and later put the whole crime on the orders of his Prime Minister whom the military authorities were pursuing.

When Masood Mahmood was so powerful as Director General, would it have been possible for the investigators to have got anything out of him by subjecting him to similar treatment as he was given after the promulgation of Martial Law? On the other hand, the

observations of CJ Anwarul, Haq on this point are both interesting and naive. “The cumulative effect of all these actions is that they are incompatible with the innocence of the appellant, for they all tended to shield the real culprits rather than to discover their identity. It is not difficult to see that if the investigation travelled in the direction of the FSF and Masood Mahmood in 1974, there was a danger of Masood Mahmood making a disclosure of the kind he made in 1977”. There is a double fallacy in these observations.

1. It goes on the premise that in such a case Masood Mahmood would have disclosed the alleged instructions of the Prime Minister to kill Kasuri. He had nothing to gain but had everything to lose by it.

2. That Masood Mahmood would have obliged the investigators to travel in the correct direction by cutting the branch on which he was perched by admitting his guilt and that of Ghulam Hussain, Ghulam Mustapha and Rana Ifthikar. In any case his implicating Bhutto would have made things worse for him.

The fact that the investigation did not progress cannot be held against Bhutto. The evidence of Saeed Ahamed Khan is at the highest consistent with the Prime Minister having been embarrassed by the unfair insinuation made by Kasuri and whatever he said or did does not necessarily prove his guilt.

The judges of the High Court and the convicting judges of the Supreme Court have placed motive as the bedrock of their findings and the evidence of Saeed Khan as strong corroboration of Masood Mahmood. In dealing with circumstantial evidence, they have not considered the alternative hypothesis which is reasonable and consistent with Bhutto’s innocence. They have also not considered whether all evidence led by itself apart from Masood Mahmood’s evidence, even slightly implicated Bhutto in the crime. They appear to have considered that Kasuri’s statement on the 11th of November 1974 at Lahore soon after the incident is a prompt complaint of some great value. Whereas it was not. It was a statement about an undisputed incident in Parliament in June 1974 that took place more than five months earlier. It remained no more or no less without any further circumstance. It was a different matter if there had been more reliable information regarding the identification of the assailants in which case there is a value attached to a prompt statement. In the present case it was a reference to an undisputed statement. It was hardly deserving the term of a “threat extended to Kasuri”. In the hands of the investigators before the military regime, it was not possible for the investigators to have moved out of square one. Even some of the lines suggested by the Tribunal were dead ropes, e.g., to question the invitees at the wedding house, the number of shots fired, number of weapons used, inquiry from the residents of the area etc. It is now known that unless confessions were obtained, no progress could have been made to net Masood Mahmood.

With regard to the non publication of the Shafir-ur-Rahman Report, it has been dealt with earlier. Investigation lines are not for publication and it may result in it being counter productive and there could be public interference with the investigations and false evidence placed before the investigators, either way, by rival political parties. There is

nothing to suggest that the lines of investigations recommended by the Tribunal were not communicated to the investigators not, that investigators of any quality were in need of such recommendations. In the meantime, If there had been any obstruction on the part of Bhutto, why was Kasuri, if that was so, kept knocking untiringly at Bhutto's door for an audience and to ask for PPP nominations to stand before the people and ask for their votes under the leadership of Bhutto? If Masood. Mahmood's evidence is out, the rest of the case presented certainly cannot hang Bhuto. What is more, the evidence does not even implicate Bhutto in the crime. What about the presumption of innocence and proof beyond reasonable doubt? What about the benefit of any doubt being given to the accused? Finally, the case depends on the evidence of Masood Mahmood. He is the self confessed criminal who made his confessional statement while in solitary confinement and obtained his pardon. His confessional statement was in regard to an incident nearly three years earlier.

His version about how he became a member of the conspiracy is most unnatural and contrary to all human probabilities. A strange story indeed to use threats and inducements to almost compel him to accept the Post of Director General of the Security Forces which was a very high post while he was languishing in a punishment post as Managing Director of the Group Insurance Fund. Again, he is abused and threatened to join the so - called conspiracy to kill Kasuri! Thereafter, he is found comfortably enjoying himself. He is described by the prosecution witness M.R. Welch as a ruthless enemy of anyone who crossed his path. Kasuri did cross his path with his attacks on the Government, the FSF and Bhutto. Bhutto could reply, Masood Mahmood could only react and retaliate in the manner he perhaps did. He was not the type who needed the orders of Bhutto to react and retaliate against the anti State elements among whom he counted Kasuri, according to the prosecution witness M.R .Welch, whom the judges accepted as an independent witness.

CHAPTER VIII

MASOOD MAHMOOD

“What manner of man was he?” This man was the Director General of the Security Forces. He was arrested on the day on which Martial Law was proclaimed. His confession was recorded by the Magistrate after he had been in detention for nearly two months. During this period he was in solitary confinement. He was interrogated by a Martial Law team. He was open to many charges for excesses of the FSF. A statement was made by Mian Abbas, Director of Operations in the FSF a gentleman 64-65 years old listing all the misdeeds of Masood Mahmood. He stated that he was dabbling in politics and harassing politicians. According to Mian Abbas he was guilty of other grave crimes. What happened to these other grave charges? Was he convicted or acquitted or did he get an overall omnibus pardon for all these alleged grave crimes? Mian Abbas was implicated by Masood Mahmood as the Director in the FSF who was also alleged to have been in touch with Bhutto and was supposed to be operating the plan to shoot Kasuri. According to Bhutto he had not laid his eyes on Mian Abbas - not even a minute’s meeting with him alone or with officials. Masood Mahmood perhaps shoved the role of the chief operator for this dastardly plan on Mian Abbas a sexagenarian who was making all efforts to give tip his post. Mian Abbas had a better reputation than Masood Mahmood who has been described as a terror in the days of his power. Masood Mahmood killed two or three birds with one stone by implicating Bhutto and gaining his pardon and by implicating Mian Abbas and thwarting his accusations about his several misdeeds true to Director Welch’s assessment of him, in his evidence. Did he diabolically fabricate a case against both Bhutto and Mian Abbas to bale out safe, when he found no other way out?

One has, however, to be conscious of the fact that after all Mian Abbas was an accused, himself in detention when he made a statement. One has to be cautious about statements made by men in such situations. In the same way, there must be caution in relation to Masood Mahmood’s statements and testimony against Bhutto. One must be cautious about the statements made by Mian Abbas against Masood Mahmood. What is sauce for Masood Mahmood must be sauce for Mian Abbas too. Otherwise one may be guilty of double standards which was an accusation rightly or wrongly made against the judges of the High Court.

Masood Mahmood was a University graduate, he joined the then Royal Indian Air Force as a Trainee pilot officer and owing to an accident he had to give up flying. He did a secretarial job and then joined the Police Services of Pakistan. He became Deputy Inspector General of Police. In 1969 he was selected as Deputy Secretary General CENTO which had its headquarters in Ankara. He came back to Pakistan as Deputy Secretary in the Ministry of Defence and was later promoted as Joint Secretary and additional Secretary. He was then appointed to a punishment job as Director, Board of Trustees Group Insurance Benevolent Fund. He was thereafter appointed as Director

General FSF, on the retirement of Malik Haq Nawaz Tiwana. His version about how he was persuaded to take up this post is rather unnatural. But truth can be stranger than fiction. But judges usually are suspicious of that type of truth which is stranger than fiction. He is supposed to have been called by Vaquar Ahamed in April 1974 who discussed with him his private affairs, the health of his wife who was an asthmatic, his heart ailment, the young ages of his children, the Bank loan he had taken for the construction of his house, and how he could be retired etc. Now Vaquar Ahamed was not called as a witness. Apart from the question of admissibility, it has to be noted whether Vaquar Ahamad would have supported Masood Mahmood on this point and in any case the defence could not test the gist of the talk Vaquar Ahamed had with this approver, Keeping this in mind and the unusual nature of the conversation, this part of the approver's evidence must be accepted only after due caution. He had a talk with Bhutto himself and he was offered this post of Director General of the Security Forces. He gave the impression that like Ceasar he would have refused the crown but for the gentle persuasion by Vaquar Ahamed and Bhutto and the sweet and sour advice from the former. He was told by Bhutto not to terminate the services of re-employed officers like Mian Abbas and to keep Vaquar Ahamed on his right side.

Then came the much mentioned incident in Parliament on the 3rd of June 1974 and the words of Bhutto which were blown up "to a threat extended to kill Kasuri". Masood Mahmood was a witness to it. A day or two later he was sent for by Bhutto who said he was fed up with Kasuri, that Mian Abbas knew all about his activities as he had been given all instructions through his predecessor Nawaz Tiwana (deceased) to get rid of him. He therefore told him to ask Mian Abbas to get on with the job and to produce the dead body of Ahamed Raza Kasuri, or "his body bandaged all over" and he added Bhutto told him that he will hold the witness personally responsible for the execution of the said order, *i.e.* to produce the dead body. Is it a natural story? Who is the conspirator in the position of a Prime Minister who would like the body of his political opponent produced for the whole world to see and know who the killers were? He went on to say he was thoroughly shaken and pleaded with Bhutto that the execution of this order will be against his conscience and it will go against the dictates of God. Bhutto, he said, lost his temper and said he will have no nonsense from him or from Mian Abbas. He raised his voice and said "You don't want Vaquar chasing after you again, do you?" The witness stated that he was compelled to accept the assignment out of fear for the personal safety of himself and his family.

Is it natural or probable, usual or sensible for a Prime Minister of all people to enter into such a conspiracy to commit a foul crime in this abusive manner? Then he goes on prodding, directly, indirectly on the telephone and through others, If all this is true, it shows how reluctant Masood Mahmood was to obey this order and how helpless he was to refuse it. Was he that type of man who had built a reputation as someone whose path could not be crossed according to Welch the Director of the FSF in Quetta? He could he fix anyone with a fabricated case. Welch was not afraid to die, he said by which he really meant he (Masood Mahmood) could even kill a crosser of his path. We shall recall his words when he was cross-examined at the Trial "Any one who had served with Masood Mahmood could realise that the better discretion would be to keep quiet rather than

contradict. In case I opposed his suggestion I would have forced him to take action against me so that what he told me would not leak out.... If I had acted otherwise he would have dubbed me as an officer disloyal to Pakistan and would have initiated action against me for that reason.... I had no fear regarding my life but Mr. Masood Mahmood could have instigated a case against me so that I did not divulge what he talked to and if I did, it would not be believed". What was this that he did not want to be divulged? It was his request to Welch to eliminate Kasuri and to look after the anti-state elements. He did not mention Bhutto at all. This man was giving orders to Welch in July 1974. What happened to him from the time he told Bhutto that producing the dead body of Kasuri or his body bandaged all over would be against his conscience and the dictates of God? What a transformation? Did all this happen between June 1974 and July 1974? With all the King's horses and all the King's men, the Prime Minister was in the parlour prodding, sending messages, telephoning, using the green line in an effort to get things moving. Is it a credible story? Is it probable? In Cafe China, Kasuri was attacking the FSF virulently, Kasuri was the one man who openly criticised Bhutto, the Government and the FSF. Whatever he said about the FSF was a direct reflection on Masood Mahmood. As Director General he was going on paying his Bank loans, we suppose, securing his job and the prospects of his young children and looking after his ailing wife. It is known that he was travelling a lot, staying in 5 star hotels with his family at home and abroad, purchasing luxury spectacles with hearing aids - this man who claimed to be sensitive to his conscience and obedient to the dictates of God.

Here was the man, who after Bhutto warned him "You don't want Vaqar chasing you, do you?" went scampering according to his evidence like a mouse to Mian Abbas who comforted him not to worry and that he will look after the job. But we find him in July 1974 only a month later a tough fully grown conspirator to murder not only Kasuri but other anti-state elements which was no part of Bhutto's so called orders.

Welch in no way says Masood Mahmood mentioned Bhutto's name, nor does Masood Mahmood himself claim he did. Perhaps the approver knew Welch will not support him on that point. Welch's evidence is very helpful to the defence and appears to reveal the fact that Masood Mahmood was master minding the conspiracy on his own and perhaps with a motive of his own for all the attacks on the FSF, the Government and Bhutto made by Kasuri. Welch's evidence shows also that the reports sent by him were routine reports.

It is rather puzzling why his evidence was not welcome by the defence. It helps the defence in a big way. The reports sent to Mian Abbas were routine check ups. On the other hand the High Court and the judgement of the CJ Anwarul Haq treat Welch's evidence as corroboration. Their reasoning is that Masood Mahmood was given orders by Bhutto and the fact that Masood Mahmood on his visit to Quetta mentioned to Welch that all the anti-state elements must be taken care of and eliminated was supportive evidence. This also means that Masood Mahmood who felt a revulsion to comply with the orders to kill one individual had within a month grown into a monster who wanted all the anti-state enemies of Pakistan eliminated and according to Welch he said that this killing was expected of every loyal Pakistani. That was the man Masood Mahmood. Welch also said he understood by the terms 'take care' and 'eliminate' that they should be assassinated.

Can such a man be believed when he stated all about his conscience and the dictates of God, one month earlier to Bhutto?

There is one significant circumstance arising out of Welch's evidence and that is that it is a damning piece of evidence against Masood Mahmood who according to this witness was instructing him to take care of and eliminate the enemies of Pakistan - on his own and off his own steam.

Welch has been accepted as an independent witness. Let us now read the observations of Anwarul Haq CJ., about this witness with which 3 other judges agreed.

“It goes a long way in proving the conspiracy between Zulfikar Ali Bhutto, Masood Mahmood and Mian Abbas and shows their determined anxiety to eliminate Ahamed Raza Kasuri. Welch had no motive at all to falsely implicate any of them, nor had he any connection whatsoever with Kasuri”.

True, Welch had no connection whatsoever with Kasuri. He had no motive to falsely implicate Masood Mahmood, Mian Abbas, or Bhutto. But he does not implicate Bhutto at all. With regard to Mian Abbas he has only sent routine reports. But he implicates Masood Mahmood and him alone. Not only does he implicate him but gives him a bad testimonial which has been referred to earlier that he is an efficient officer but a diabolical personality who would have fixed him if he crossed his path.

It is difficult to understand how the prosecution thought he was a good witness for them, how and why the defence cross examined him and how the judges of the High Court and the 4 convicting judges of the Supreme Court thought he had supported the prosecution case. Equally it is difficult to understand how the defence did not see this witness as one who was very helpful to them. Even the acquitting judges did not see this aspect of his evidence. Haleem J., appreciated quite correctly that this witness did not help the prosecution case. On the other hand, no one on an evaluation of Welch's evidence saw the importance of his evidence from the Defence point of view.

The plan to kill Kasuri was being worked according to Masood Mahmood from June and at last it was accomplished in November 1974 in Lahore. But it was Kasuri's father who was killed. Masood Mahmood then related how he was with the Prime Minister in Multan on the morning of the 11th of November 1974 when he received a telephone call from the PM that Mian Abbas has made “complete balls” of the situation and that instead of Kasuri he had got his father killed. On his return to Rawalpindi, the approver stated that Mian Abbas met him and told him that his operation was successful but it was the intended victim's father who was killed. Later in the day, he went and met Bhutto who was peeved and agitated and told him the actual task has yet to be accomplished to which he replied “At your behest an idea conceived by you was carried out and communicated by me to Mian Abbas who had already your directions through my predecessor and the fact remains that both you and I and my subordinates will be taken to task by God almighty, but will not carry out any such orders anymore”. Thereafter Bhutto “piped

down” but kept on goading him to assassinate Kasuri. He categorically said “no”. Thereafter he says attempts were made to kidnap his children from Aitchison College, Lahore. There was poisoning of food at Chamba House where he discovered that some of his own subordinates seemed to have been won over, as he saw them lurking around at places where they should not have been when he was around.

In other words, he was a fugitive from an assassin’s attack. We only know his children were never kidnapped, he never was poisoned and he had all the resources to deal with his “lurking” subordinates. He was never chased by Vaquar Ahamed. He never lost his job, he was never retired, he and his wife were going on foreign journeys and he continued to be in happy circumstances. How do these circumstances tally with the picture he had drawn and his compulsive fears which brought him into the conspiracy? According to his story, he defied Bhutto to his face and did not carry out his orders. Did he suffer all that he says he suffered and that too at Bhutto’s hands for not carrying out the second order of the Prime Minister? Was there any evidence of that. Was he a victim of harassment for the next 2 ½ years of the Bhutto regime or was he in clover?

The witness admitted in cross-examination that he did a second trip to London for a Medical check up. He took his wife as an official attendant. Both of them stayed at the Intercontinental. He purchased two pairs of spectacles (fitted hearing aid) for £400. The witness was able to enjoy all these facilities evidently for the reason that he was able to throw his weight in Pakistan over the authorities. The Embassy in London gave him VIP treatment. Would he have enjoyed all this if he defied Bhutto to his face or fallen foul of Bhutto and the government? Wasn’t he a sort of person in the midst of all this luxury who would have had a motive for eliminating Kasuri who was one of the few if not the only open critic of the FSF indirectly involving the Director General. It was really not necessary to involve his wife but questions were asked which were not correctly recorded in the High Court but referred to in the Supreme Court judgement in regard to the defence suggestion that he had no scruples to marry the wife of his friend and one time colleague in the Air force Manawer Ali Khan. It was perhaps an irrelevant though a true suggestion. On his evidence, this witness was not too happy to accept the post of Director General which was quite unusual especially for a man like him who was ruthlessly ambitious who loved power and authority. He had been twice sent abroad on a study tour of the forces equivalent to the FS F in West Germany, Belgium, USA, Japan and U.K. He stayed in the best of hotels, in deluxe suites which cost far above the costs allowed by the Government rules.

About the cost of his ‘luxury’ spectacles when asked who paid for them, his reply was the matter was under consideration at the time he was taken into custody in July 1977 but when he was confronted with a letter from the Pakistan Embassy to the Ministry of Interior division, he was forced to admit they were paid for by the Government of Pakistan.

There were many other matters, too many to recount, where this witness gave very unsatisfactory evidence. Yet this witness utterly convinced all the judges of the High Court and the 4 convicting judges of the Supreme Court. None of these matters disturbed

their judicial minds but on the other hand, his testimony appeared to have been treated sacrosanct and as an article of faith totally acceptable to 5 judges of the High Court, and 4 Supreme Court judges in appeal.

This witness was a self confessed criminal, protesting about his religion, God and his conscience. Should not his testimony have been examined in view of its improbabilities, its unsatisfactory nature, being evidence based on many statements made nearly 3 years after the events testified to, after many days in solitary confinement and with all the progressive *impro limine* additions and omissions under the interrogation of the military authorities? The judges who accepted his evidence did not examine even the motive he had to implicate Bhutto to save his skin when he was called upon to explain a multitude of his misdeeds. The motive to kill Kasuri was made the basis of the conspiracy while the motive for Masood Mahmood to implicate Bhutto falsely to save himself was totally ignored.

This was not done by the judges of the High Court and the convicting judges of the Supreme Court. None of these matters disturbed their judicial minds. Were they right after all? They totally accepted the submissions of the prosecution.

When one treats him as an accomplice, the law only says “accept his evidence if you believe it but examine it a bit and as a matter of prudence look for some corroboration from another source independent of the accomplice which implicates the accused”. Did all that Welch says implicate Bhutto at all or necessarily in the conspiracy?

The Counsel for the prosecution was at great pains to submit the proposition that the degree of corroboration should vary under varying circumstances that is to say an accomplice like Masood Mahmood who claimed to have been pressurised or compelled to sin need not have his testimony strongly corroborated. In other words the rigour of the rule that an accomplice must be corroborated in a material particular by independent evidence could be slackened in the case of a pressurised accomplice. What about a pressurised witness compelled by circumstances to implicate another to obtain a pardon himself to save his skin?

The judgement of the High Court and the majority judgement of the Supreme Court observed that Masood Mahmood got many favours from Bhutto and he had no reason to implicate Bhutto. The approver on the other hand did not concede this in his evidence. His position was that he was being hounded and harassed. Attempts were made on his life, he said, attempts to kidnap his children, attempts to poison his children, and there were his lurking subordinates behind every bush. The facts on the other hand indicate that he continued to wield power and authority as ever before. These learned judges were even asked to consider many cases which established the principle that the strict rule of corroboration could be slackened in certain type of cases. We have outlined some of the infirmities and improbabilities in the testimony of Masood Mahmood.

In the totality of all this evidence led, did any item of evidence independently and unerringly point the finger of guilt either singly or cumulatively with other items at

Bhutto that he was in the conspiracy. Were all these items of evidence conclusively without any reasonable doubt consistent only with the guilt of Bhutto and totally inconsistent with any reasonable hypothesis of his innocence?

The judges of the High Court and the 4 convicting judges of the Supreme Court that is to say the judgement of the High Court and the majority judgement of the Supreme Court appear to have arrived at the answer first and did the reasoning thereafter. They completely ignored the elementary principles of Law like the presumption of innocence, proof beyond reasonable doubt, the benefit of a reasonable doubt and the application of the law in relation to circumstantial evidence, motive and corroboration in this particular case. It is most unfortunate that these judgements were not fair by the judges themselves who wrote them or the judges who subscribed to them.

When considering the case of pressurised accomplices or participants in the crime, we must also consider the case of pressurised witnesses who make confessional statements implicating the man whom the authorities want. It cannot be ruled out that Bhutto was the much wanted person pursued by the Martial Law regime? Here was a man who was to lead the Pakistan People's Party at the promised General Election. Could they have risked his coming back to power after all that happened since the promulgation of Martial Law?

Another matter, to bear in mind even if it did not disturb the minds of the convicting judges of the High Court and Supreme Court was the fact that Masood Mahmood was given a pardon on condition that he will adhere to his confessional statement. That is in accordance with the law. In other words the star witness for the prosecution could not afford to even deviate into some truth. He made a confessional statement to save his skin and obtained a pardon. He had to stick by it thereafter or improve on his confessional statement. Masood Mahmood was thus

- (1) an unsatisfactory witness
- (2) He was an accomplice and a participant in the crime
- (3) He coughed out his guilt nearly three years after the crime
- (4) He made his confessional statement long time after he was arrested, detained and kept in solitary confinement
- (5) There were many other charges against him
- (6) He implicated Bhutto and that was his life belt.
- (7) He was not only an accomplice, he was a pardoned witness who had a motive to implicate Bhutto.
- (8) If he did not implicate Bhutto, Bhutto could not have been even charged in the case.
- (9) He was an indispensable witness for the prosecution.
- (10) He obtained his pardon on condition that he will abide by his confessional statement and implicate Bhutto.

Hardly any one of these matters were examined by the convicting judges. None of these matters disturbed their judicial conscience. On the other hand they swallowed the total evidence of Masood Mahmood hook, line and sinker.

Masood Mahmood had many other crimes to account for besides the killing of Kasuri' s father. Falsely implicating Bhutto, so pleasing the authorities could have been the only salvation for him and his family, when he found himself caged in solitary confinement with the real prospect of the skies falling on him and his family.

CHAPTER IX

EVENTS & COMMENTS ON THE HIGH COURT TRIAL

The Trial of Bhutto and others in the High Court of Lahore was before the following Judges:

Mustaq Hussain CJ.
Zakuddin Pal J.
M.S.M. Qureshi J.
Aftab Hussain J.
Gulbaz Khan J.

The trial commenced on the 11th of October 1977. The special Public Prosecutor was Ijaz Hussain Batalvi. Bhutto was defended for part of the proceedings by D.M. Awan Ihsan Qadir Shah, Inayatullah. Mian Abbas by Sadiq Ikram and the others by Irshad Ahmad Qureshi.

As stated earlier Bhutto's defence on the conspiracy and murder charge was a complete denial and so was the defence of Mian Abbas, but the others took up the position that they acted in obedience to superior orders and under duress. They took up the position that they were brain washed and they had lost their will and were not free agents. They confessed to the facts against them.

They were all found guilty on the 18th of March 1978 and were sentenced to be hanged. We have specially dealt with the case against Bhutto.

There were many sad and unfortunate incidents while the trial proceeded and at the outset before the trial commenced. It certainly cannot be said that the trial was conducted without heat and in a cool atmosphere conducive to a fair trial or what even appeared to be a fair trial so much so that it cannot be positively conceded that justice appeared to have been done as far as Bhutto was concerned.

The situation in the country was tense, the investigation was conducted by a team of Martial Law Authorities, and the principal witnesses were self confessed criminals who made their confessional statements after a long period of indefinite detention and solitary confinement.

The reader is requested to turn back to Chapter III and note the relevant events in their chronological order. This will give an idea of what was happening outside and inside the Courts and set the hearing of the trial in its proper context.

There is no question that from the 5th of July 1977 the Military regime under General Zia was in complete control of the Government. The powers of the judiciary and the executive were under the military authority and the legislature ceased to function. Every one in Pakistan was in full realisation of this fact and judges too were fully sensitive to this fact which was as large as life. We could not have expected the judges to have been insensitive to the new forces both in the literal and metaphorical sense. The trial commenced on the 11th of October 1977. About a month earlier on the 6th of September, General Zia in an interview with the New York Times stated that he had personally authorised Bhutto's arrest. He had no knowledge he observed of "What type of leader we had. Mr. Bhutto was a Macchiavelli in 1977... an evil genius running the country in more or less Gestapo lines, misusing funds, blackmailing people, detaining them illegally and even perhaps ordering people to be killed".

It was really a matter for favourable comment that at this time Justice Sandani of the Lahore High Court released Bhutto granting him heavy bail. It was stated in German Newspaper (Conservative) that Justice Sandani later was transferred as Law secretary. Despite the Court release Bhutto was arrested and detained by the Military Law Authority. On the 15th of September 1977, General Zia told the *Urdu Digest* that Bhutto is a cheat and a murderer. He also stated that on available evidence he will not be able to escape severe punishment.

However, on the 17th of September 1977 General Zia broadcast a statement which must have made the judges to feel that he will be giving complete freedom to the judiciary and the Press and the Elections he promised within 90 days of the 5th of July 1977 would be held soon after the Bhutto trial. He also promised a fair trial for Bhutto. He emphasised that Justice and Democracy demanded that Bhutto and "his colleagues" should be given every opportunity to clear their names. The inquiries were to start at once. The verdict about their guilt or innocence was to be given before the elections which were only held more than 8 years later!

The Trial for murder was not the only problem that Bhutto had to face; there were accusations and threats to try him for various abuses and misuse of power during his regime before Military Tribunals. His wife Nusrat Bhutto and his daughter Benazir Bhutto were from time to time put under house arrest. It cannot be denied that Bhutto and family were put through a very hard time and through a trying experience and to say the least Bhutto was not having the facilities and not being afforded the best possible opportunities to present his defence. Some of the statements made by Kasuri, Masood Mahmood and others were not supplied to the defence.

Another matter of significance was that the elections were to be held soon after the Bhutto's trial. In other words the elections were to be after he was found guilty or innocent of the crime. In the circumstances the verdict was inevitably going to be a determining and a deciding factor with regard to the elections. For instance what if Bhutto was found not guilty and a general election was held thereafter?

What then would have been the verdict of the people against the Martial Law Authorities, the privileged few and the vested interests who had or were regaining their lost privileges and interests? The fate of Bhutto was to be inextricably interwoven and connected to the results of the elections if after all they were to be. If Bhutto came back to power, what would have been the possible fate of even the prosecutors, investigators and even the judges some of whom had hailed Zia, as a National Saviour? People are human and subjectively they would have had their fears and perhaps these fears would have been at least in their subconscious mind. Important human exercises cannot be free of certain psychological factors at a time when there was so much tension in Pakistan. It was altogether unfortunate. It cannot be denied that the circumstances were heavily loaded against Bhutto. There were so many demonstrations and protests in different parts of the country and in Lahore where the trial was held. There had been flogging and arrests of these demonstrators by the Military Authorities. The atmosphere was certainly not congenial and conducive to a fair trial. We must also take note that at a time such as this, how few were in a position to help Bhutto in the preparation of his defence and could have given assistance or moral support? Certainly his enemies would have been active. These human realities cannot be disregarded.

There was a complete constitutional breakdown. General Zia of course reassured everybody that the constitution had not been abrogated but it was only in abeyance and that democracy would be restored after the elections which would be held after all the sinners were identified and given the treatment they deserved. For 8 long years these elections were not held!

On the 22nd of September 1977, Yakub Ali Khan CJ., was retired and Anwarul Haq was appointed Chief Justice. In the meantime there was an application before the Supreme Court.

It was a *Habeas Corpus* application filed by Begum Nusrat Bhutto challenging the order of arrest and detention of her husband as being unconstitutional and illegal. On the 23rd of September 1977, however, the New Chief Justice took his oath of office along with other judges of the Supreme Court omitting the paragraph whereby the judges had to swear the oath of allegiance to the 1973 constitution “to preserve, protect and defend the constitution”. All the said judges had earlier taken oath inclusive of the said abandoned paragraph when they assumed their respective offices. In other words they breached their earlier oath and did not keep their faith. Understandable it was, yet it was an understandable fact. It was in this immediate context that the trial in the High Court commenced on the 11th of October 1977. (vide Keasing’ s Contemporary Archives)

It is not without significance that the unconstitutionality of Bhutto’s arrest and detention were considered by the judges of the Supreme Court who owed no allegiance to the constitution while hearing the *Habeas Corpus* application presented by Begum Nusrat Bhutto and on the 10th of November 1977, the said application was dismissed. They also held that the imposition of Martial Law although an extra constitutional step was validated by the “doctrine of necessity” as the moral authority and the constitutional authority of Bhutto’s Government has completely broken down; it was in this situation

that the Bhutto's trial took place, his appeal was heard and he was at last hanged. The judges therefore owed no allegiance to the Constitution and Pakistan was not ruled in accordance to its constitution. It may even be stated with a considerable measure of justification that even the Courts of justice and the judges were only de facto institutions and de facto holders of office respectively.

Various objections were taken and many were the applications that were made to transfer the trial to another Court and these applications were made at the beginning and in the course of the proceedings. It was unfortunate that bickerings were taking place continuously and all the objections and applications were turned down and these episodes ended in the "*in camera*" proceedings in the High Court and the boycott of the proceedings by Bhutto. The whole trial was conducted in an altogether tense and heated atmosphere and an inescapable impression was created that the defence and the judges were in open confrontation with each other and situations developed which created hard feelings between the judges and Bhutto and the judges and counsel appearing for Bhutto. No one interested in the dispensation of justice would welcome such a situation in Court especially trying an accused on a capital charge. It is not necessary to deal with the legal merits or the right orders and the possible wrong orders made in the course of the proceedings. After all if judges make mistakes, they can be set aright in the Appellate Court. Reference therefore will be mainly confined to the major episodes *i.e.* the transfer applications, the *in camera* proceedings and the boycott of the proceedings by Bhutto. It would appear that the Court steam rolled over all these applications rightly or wrongly and proceeded to give a unanimous judgement against Bhutto with what could appear a remarkable disregard and insensitivity to the traditional forms of justice. There was more than one serious crisis during the proceedings. All of them were certainly not created by the Court. A few were the creation of the Defence but most of them were avoidable if the Court had consciously made an effort not only to do justice but appear to do justice. It is a matter for sad comment that the oppressive tensions outside the country seemed to pervade inside the Court, affecting the judges, counsel and the accused Bhutto in an altogether unfortunate overall situation.

Before the start of the trial the principal accused as Bhutto was called by the High Court judges challenged the constitution of the Court on the ground *intar alia* the Chief Justice's appointment as Chief Election Commissioner and his televised Press interview provoked an immediate reaction from the PPP which under the Chairmanship of Bhutto passed a resolution condemning him. This was also released to the Press. This resolution alleged partisanship against Justice Mushtaq Hussain. The objection lamented that there was a travesty of justice in combining the offices of the Chief Election Commissioner with that of the Chief Justice of the High Court.

It went on to allege that Justice Mustaq Hussain on the retirement of Justice Iqbal as Chief justice in 1976 was superseded during the Bhutto regime although he was the most Senior Puisine Justice of the Lahore High Court and therefore had a grievance against the party. This allegation was also repeated in the application for transfer on behalf of Bhutto before the High Court and Supreme Court. When the Defence made these applications, the High Court dismissed them *in limine* on the 9th of October 1977.

It is unfortunate that there was this refrain again and again during the proceedings after some incident in Court. It is all the more regrettable because after an interim order made on the 24th of September 1977 with regard to the commencement of the proceedings in the High Court, Bhutto did state as follows “I have the fullest confidence in Your Lordship’s Court.” This happened when Bhutto’s junior counsel Affab Gul on that day which was the first date of hearing of the case requested for three weeks adjournment for preparation. The Bench adjourned for 7 days with the assurance that a further adjournment will be considered if necessary. Junior Counsel protested whereat the Court asked him what he meant by saying “even after Mr. Bhutto had made a request for adjournment of the case for 3 weeks.” Bhutto had been formally indicted only about 12 days earlier. Perhaps the High Court proceedings started on the wrong foot.

Many unfortunate circumstances followed thereafter. These were applications which were all rejected *in limine* on the 9th of October 1977. All this happened in the background of directions given by the military authorities that the inquiry must be commenced without delay. Anyway the trial commenced on the 11th of October 1977. On the 13th of November Bhutto fell ill. The medical certificate supported the fact that Bhutto was suffering from respiratory infection, gastritis, acute influenza with debility and high fever. The Court adjourned till the 15th of November 1977 but the Court rather callously and prematurely warned counsel that there is a provision in the law to carry on in the absence of Bhutto as long as his counsel is present. On the 15th of November, Bhutto was not present. He had not recovered from his illness. The hearing was resumed regardless of Bhutto’s absence. The application for further adjourn-merit was refused despite the report of Professor Ifthikar Ahamad Secretary for Health, Government of Punjab after he examined Bhutto. He was continuing to have acute influenza, temperature, debility with severe nasal conjunctive congestion.

On the 25th of November 1977, Bhutto wrote to the Superintendent of Prisons Lahore that he is slightly better but cannot attend Court for 5 hours at a stretch. The Court instead of accommodating the accused directed that the accused be examined by a Medical Board constituted by it. It was not necessary to appoint this Board as Bhutto himself had said he was only feeling weak. On the 26th of November, prosecuting counsel reported that Bhutto refused to be examined by a Board as he said he was not suffering from any organic disease. He only needed rest and that he will be able to attend Court on the 3rd of December, We find that during Bhutto’s absence between the 13th of November and the 30th of November, 15 witnesses had been examined and cross examined, regardless of the accused’s inability and difficulty to attend Court.

It will be useful to take stock at this stage of all the unfortunate incidents that had taken place up to the 30th of November 1977 to understand how on the one hand the Court was exasperated with the accused and on the other hand’ the diffidence of the accused in his getting justice from the Court was gathering. As stated, on the 24th of September 1977 at the very outset the Court was grudging the accused a 3 weeks adjournment to prepare a case on an incomplete and inadequate brief. This surprised the junior Counsel and he protested. The Court wanted to know what he meant by saying what he said *viz*, “Even

after Mr. Bhutto had made a request for an adjournment of the case for 3 weeks, the Court had granted a shorter adjournment”. Bhutto intervened and stated “My Lords, I have the fullest confidence in Your Lordship’s Court”. This remark of Bhutto was flashed in the next day’s newspapers that Bhutto stated that he had the fullest confidence in their Lordship’s Court. On the same day that Bhutto read this, there was already an application before the Supreme Court to the effect that he feared that the Chief Justice was prejudiced against him and since he would not get a fair trial, the present constitution of the Bench should be different. This application was-being supported, having already been filed in the Supreme Court on the very same day.

The intervention was to save the situation. He did not want the Court to pounce on his counsel nor for his counsel to say anything which could infuriate the Court further. Here was an order which was alright by him and if a week’s adjournment was given and after that further adjournment given if necessary after consideration as the Court indicated there was nothing to quarrel about and moreover-there was an application pending about the constitution of the Court which included the Chief Justice.

The press did the mischief most unfortunately. Anyway it carried Bhutto’s remark “I have the fullest confidence in You Lordship’s Court”. Bhutto objected to this news item. He stated that this confidence was limited to the order made by the Court about the adjournment and he did not express general confidence. Bhutto said it was inconceivable that he said he had the fullest confidence generally in the Bench when he had specifically instructed his counsel in the Supreme Court against the prejudice and partiality of the Chief Justice. The Trial Bench rejected this explanation in its order dated the 9th of October as “Not worthy of credence” thereby disbelieving Bhutto who was yet to be believed at the trial. With great respect, it is difficult to agree with the rejection of this explanation. Bhutto had the right to explain the news item and the way it was recorded, though he may not have had the foresight and prudence to realize that it was this Bench that was finally going to try him. On the other hand if the Chief Justice instead had observed “Mr. Bhutto, you made the remark and you should know best what you meant. We were happy up to this moment that you had confidence in. us. You disappoint us. But we have the confidence that we will do justice by you”, the matter would have ended there.

In such situations, a judge who has no brief to defend himself and is in a privileged position can afford to be large, can afford to even laugh at himself and earn respect for all the more reason. A judge always gets the respect that is owing to the institution but he earns the personal respect of the Bar and the persons before him when he is objective and dispassionate. Even when rather hurtful remarks are made against him, he must ignore them or if he wants to reply, his observations must be of a much superior quality which is least hurtful. This was altogether an unfortunate incident when the court put itself in issue and disbelieved the accused even before the trial commenced. Bhutto’s explanation was totally acceptable. When he was pursuing his application for transfer in the Supreme Court, he could not have at the same time expressed general confidence in the High Court.

On the matter of the illness of Bhutto, there was no dispute on the question of his illness. It was fully supported by the Medical Certificate. It was utterly unnecessary when all that was asked for was a two day adjournment, for the Bench to have warned the Counsel that he must be prepared to go on without his client on the 15th if he was still ill and reminded him that there were provisions to meet the situation in that event. They were referring to section 540 of the Criminal Procedure Code which reads.

“(1) If at any stage of the inquiry or trial under this Code, when two or more accused are before the Court, if the judge or Magistrate is satisfied for reasons to be recorded that any one or more of such accused is or are incapable of remaining before Court, he may if such accused is represented by a pleader dispense with his attendance and proceed with such inquiry or trial in his absence, and may at any subsequent stage of the proceedings direct the personal attendance of such accused;

(2) If the accused in any such case is not represented by a pleader or if the Judge or Magistrate considers his personal attendance necessary, he may if he thinks fit adjourn such inquiry or trial or order that the case of such accused be taken up or tried separately”

When the Court told defence Counsel that it could dispense with the presence of the accused as soon as the application was made for a two day adjournment it could have created the inevitable impression that the court was only keen to finish its task as soon as possible. It almost warned the counsel that if Bhutto does not present himself on the 15th, it could make use of section 540 (1). The Court expressed its impatience and also gave the impression that it was trying to satisfy the Martial Law authorities by following its instructions to speed up the trial before the elections, forgetting that the most important personality in the trial was the accused who must be given the best opportunities to defend himself. The General Elections which never came for another 8 years was not the problem for a Court trying an accused person on a capital charge. The other work of the High Court when 5 Judges were participating in the Bhutto trial was not the problem for the court trying an accused on a capital charge. The only task before them which they appeared to have forgotten was to do justice by the accused and of course by the prosecution. The other accused did not object or complain and even the prosecution did not express any wrong views. So why did the Chief Justice jump the gun and quite prematurely decide to act under the said section? If the court was in a hurry, they had no business to participate further in a trial of this nature. While on the subject of the injustice done to the public by the laws delays, this is perhaps one of the few cases where Judges were in a hurry to do what they thought was justice. The fact that Bhutto was ill was never disputed. On the other hand, the Chief Justice made a sarcastic remark from the Bench which naturally created resentment in the ranks of the defence. When the accused was applying for the adjournment through his Counsel and the Court had decided to appoint a Board to medically examine him, the Chief Justice called for one of his two stenographers but both had not yet shown their presence inside Court. He is then supposed to have told his private secretary loudly, “Khokar where have the other two fellows gone? I hope they are not suffering from influenza”. It was certainly an uncalled for remark. Counsel heard this remark. But it was denied by the presiding Judge and it was said that Khokar was the reader of the Chief Justice and not his private secretary.

The credibility of the Chief Justice was straightaway put in issue with the credibility of the Defence Counsel. It was unfortunate that the 4 convicting Judges of the Supreme Court took the view that dispensing with Bhutto's attendance was permitted under section 540 of the code. They observed "In view of the importance of this case a large Bench of 5 Judges had been specially constituted for its disposal on the criminal original side of the High Court and the prosecution evidence was being recorded almost from day to day as usual in all murder trials. The importance attached to this case and the circumstances prevailing in the country demanded that it should be disposed of on the merits without any inordinate delay". With great respect one has to bow to the superior wisdom and sense of justice of these Judges, but one cannot understand;

- (1) how the importance of the case should hustle the Judges to dispense with the accused's presence when originally only a two day adjournment was asked for?
- (2) How the importance of the case should affect the interests of an accused? To whom else was it important?
- (3) What was the importance of this case and for whom that it should have gained judicial notice? It was certainly a matter of importance also to the accused.
- (4) Does the importance of a case supersede the interests of justice?
- (5) What is "the importance attached to this case" and what are "the circumstances prevailing in the country" demanding the quick disposal of this case?
- (6) Who attached importance to this case?
- (7) Can the importance attached to a case and the circumstances prevailing in the country be a deciding factor to determine the dispensing of the presence of an accused and the jettisoning of the interests of justice?

The interests of justice ought to have been the one and only deciding factor when the discretion to proceed with the trial in the absence of the accused was exercised. According to the defence, there were many other insulting remarks made by the Chief Justice. Many times Bhutto was asked to keep standing. He was placed behind the dock and was given a chair with the observation made by the Chief Justice "We know you are used to a very comfortable life". It was the defence submission that a dock was put up in Court for the "principal accused" to cage and humiliate him with the result he was not able to give instructions to his lawyers. There was one occasion according to the defence when the Chief Justice with venom referred to a hypothetical case of Judges being superseded for the appointment of a Chief Justice. It was certainly an unwise observation of the Chief Justice who was in fact one of the Judges who was superseded during Bhutto's regime and as a result had to wait long to be a Chief Justice about the time of the hearing of Bhutto's trial.

The Chief Justice also gave an interview to two foreign correspondents one of them being Mr. Mark Tully, the BBC representative. This interview was broadcast by the BBC and reported in the Pakistan "Times" and in the National Newspapers. He spoke about Common Law traditions and that he was disappointed that the Amnesty International did not send observers *etc.* He said how the case was being tried by 5 Judges although the law required only 2 Judges. This was most unusual for a Judge to protest so much about the fair open trial that was to be and never was soon after. This interview was ill advised. For whose benefit and for whose sake was this interview? Judges must realise that the most important person they must satisfy that there would be justice done will be the accused which the Chief Justice, with great respect, failed to achieve as far as Bhutto and his Counsel were concerned. It is true that everyone should be equal before the law. There need be no special treatment for a VIP, but it does not mean ever that because a person is a VIP he gets a different treatment for the worse from what an ordinary citizen gets. The law must be fair both to the ordinary citizen and to a VIP.

The Chief Justice was harsh to Bhutto's Counsel who was a Senior member of the Bar and was very often rude and insulting referring to the quality of his cross-examination. No doubt he was only one of the 5 Judges but judicial behavior of the presiding Judges was never redeemed by any of the 4 remaining Judges. As we stated earlier the case commenced on the wrong foot. We must be mindful that a complaint and an application for transfer to another Court had more material when a second application was made in January 1978, including Mark Tully's interview and the insulting remarks to the accused and Counsel *etc.* The trial was on its 5th and 6th day when there was an incident between Bhutto's Counsel D.M. Awan and the Chief Justice in a loud tone shouted "sit down" and refused to hear him whereupon Mr. Awan helplessly remarked "My Lords, we know that all the restrictions are for the Defence Counsel". This observation imputed partiality and it should never perhaps have been made. It must have, however, been provoked by some cause given by the Bench. The judge severely reprimanded Mr. Awan and when the latter looked at him in astonishment, the Chief justice screamed at Mr. Awan "Why are you staring at me"? The Chief Justice warned the press not to report this incident. On the 16th of October, the next day, Counsel was ill and unable to attend Court and Kasuri's cross-examination was resumed by another Counsel on behalf of Mr. Awan. This happened within a few days of the trial and the tension kept mounting thereafter.

On the 17th of December after Mr. Bhutto's illness: it so happened that Bhutto wanted to draw the attention of his Counsel from where he was behind the dock, and when he failed in his attempt he uttered the words "damn it". The Chief Justice heard this and pulled up the accused asking him not to address his Counsel like that. Bhutto replied, "I have had enough of this". No one would say that the Judge had no powers to control the proceedings, no one would say that Bhutto was correct when he uttered the words "Damn it" but the whole episode was avoidable and the Chief Justice could have ignored the words and not made an issue of it when it was not a matter between him and Bhutto. Besides the exclamation "Damn it" was not addressed to Counsel. It was just an expression of frustration. Later Bhutto explained that he was tensed up as he had heard that day that his wife had been attacked and had received a head injury when she had

gone to witness the Pakistan v. England Test match. This episode took place on the day the Court wished to sit through the winter vacation. Bhutto was taken out of Court on orders of the Court. This incident again need not have gone so far. The Court could have dealt with the situation differently. In a situation like this it was easier for Court if it did not want to allow the “Damn it” remark to go unnoticed to have turned to Bhutto and observed, “We are sure Mr. Bhutto, you don’t mean it. Your Counsel can be sensitive”. The Court instead involved itself with its dignity etc. and as a result contributed by its over reaction to the great indignity of the Court proceedings.

There was an incident in a court in Sri Lanka, when a lady Counsel was cross-examining a lady witness and the cross-examination lapsed into comments, and a running commentary of the witness’s evidence. The Court was ignored. The prosecuting Counsel strongly objected to this manner of cross-examination. The Judge knew that if he pulled up the lady Counsel, it would have been unfair by her client and further it would have been unchivalrous on his part. So he addressed the prosecuting Counsel and with a wink shouted at him “Mr. Prosecutor, I am surprised at your manners, when two ladies are engaged in a delightful conversation, you must not distract them, surely.” The lady Counsel looked at the Judge, blushed and with an apology resumed her cross-examination in the proper way. The judges of the High Court and the Chief Justice never consciously or unconsciously relieved the mounting tensions in Court. Instead they or rather the Chief Justice generously contributed to the gathering tensions. It will be nice for learned judges to cultivate a sense of humor and have a capacity to relieve tensions rather than create them. It was very unfortunate indeed that none of the 5 Judges displayed any sensitivity to prevent this gathering tension. It was also a matter for complaint that the Chief Justice and the other Judges, as alleged, used to cover the mikes in front of them lest what they said which they ought not to have said got taped.

On the 11th of January 1978 in the course of the cross-examination of the witness Ghulam Hussain, the witness said the sten gun had been obtained for use against the Chief Justice. The witness later corrected that by Chief Justice he meant retired Justice Syed Hussain Rizevi and the CJ. observed that he should have said Judge and not Chief Justice and the turn of the Chief Justice had yet not come whereupon Bhutto remarked “It will come”. The CJ., directed the officer in charge of the Police on court duty to make an entry at the nearest Police Station and observed that if anything like that did happen someone would be accountable for it. The Court was not able to ignore this light banter with equanimity. It becomes abundantly clear on examination of the proceedings that the Bench failed to control the proceedings and maintain the dignity of court due to a manifest hostility displayed towards the principal accused. Consequently the original application for transfer made by Bhutto appeared to be justified by reason of the subsequent judicial behavior of the Chief Justice.

Two references are being made to the legal objection to various items of evidence on grounds of hearsay and the rulings made against the defence. As earlier stated Judges have the authority to make their ruling as they consider right. Complaints, however, were made that all the objections taken by the defence were over-ruled and all the objections taken by the prosecution were upheld.

Even at the close of the prosecution case, Bhutto made an application on the 22nd of February 1978 that the prosecutor should be called upon to sum up his case against him so that he could reply. This was rejected on the basis that the Criminal Procedure Code gave the right of reply to an accused only if neither he nor any one of his co-accused called evidence in their defence. The Judges held that this was a mandatory provision. In the present case Bhutto did not call any defence and his position was a total denial and was quite different from the defence of the other accused. In other words the defence called by the other accused had nothing to do with Bhutto's defence. This was a case where there should have been a liberal interpretation given to the relevant provisions relating to the right of reply. Bhutto then refused to argue his case. It was a very appropriate case where a liberal interpretation should have been given in favour of an accused who called no defence.

Besides, he had no counsel and for 15 days of the proceedings, the trial proceeded in his absence; he should have been given a fair opportunity to meet the prosecution case against him after the prosecution stated its case. The High Court thereby was never able to consider the defence position in their judgement. The accused Bhutto declined to argue his defence when the High Court did not allow his application that the prosecution must state its case against him first. The better view is that this application should have been allowed and no grave injustice would have been done to the prosecution. On the other hand, the defence submissions may have helped the Judges to consider the defence more fully which they failed to do in their judgement. The Court had discretion to allow the application and one cannot agree that the provision is absolutely mandatory. The Court has a discretion in the interests of justice and no one could have complained. Complaints were made that all the applications made by the prosecution were allowed. This is true to a large extent but it is not necessary to go into detail over them except in relation to PW 3/16-D referred to earlier pertaining to the photostat copy of a report by Saeed Ahmad Khan about Kasuri wanting an audience with Bhutto dated 29/7 and Bhutto's 2 endorsements to the effect that Kasuri must be kept on the rails and that he is a lick etc. These endorsements were held to be inadmissible as the defence had not summoned the prosecution to produce the original of the document under section 65 of the Evidence Ordinance. It was found later that the prosecution was summoned to produce the said document which could not be traced in the Prime Minister's office. The endorsements were ruled to be inadmissible on the wrong ground but what was worse was that these endorsements were held to be "clearly forgeries." The cumulative effect of all these circumstances, scenes and episodes were very harmful for the conduct of a just trial and one gets the impression that the defence was at issue not only with the prosecution but with the judges. Let the reader answer the question whether Zulfikar Ali Bhutto got a fair trial in all these circumstances.

Of course the Supreme Court in appeal did answer this question. Four of the judges who convicted Bhutto examined all these circumstances and said that substantial justice was done to Bhutto. The other three judges were of the view that Masood Mahmood's evidence was palpably false and the prosecution failed to prove the case against Bhutto and therefore it was not necessary for them to adjudicate on the question of the bias and

prejudice displayed by the Court of trial. It is a pity they did not. It was understandable. They did not want to embarrass the judiciary. They understandably but unfortunately found that it was unnecessary in view of their order of acquittal. But they knew they were in the minority and bias was an issue in the appeal. They ought to have answered that issue which was answered by the majority of the Judges, on the question of bias and the unfairness of the trial.

The transfer application was made by Bhutto on the 18th of December 1977 with a request that it be taken up during the Winter vacation. This application was dismissed on the 9th of January 1978, after it was heard in chambers and *in camera*. Thereafter Bhutto cancelled his instructions to his lawyers, and he was unrepresented. This hearing in Chambers surprised Bhutto who expected to be heard in open Court. The Court maintained that motions were heard in Chambers and Counsel supported them. The Counsel came into chambers and Mr. Awan made his submissions without arguing the points already rejected in the earlier application. But the balance points were new points which the Court considered scandalous and insulting intended to lower the dignity of Court. His Counsel wanted to withdraw from the case which was not allowed but Bhutto was given an opportunity to add to the submissions of Counsel on the merits of his application. The Court in Chambers commented that Bhutto made a political speech which was to use their own words “absolutely irrelevant”. The accused stated that if he was not allowed to state what he wanted to state he will not address the court any further. The petition for transfer was dismissed. Now this situation would never have arisen but for the lack of confidence on the part of the accused by reason of the Judicial behavior and the manifest hostility from the start of the Proceedings. This demoralised Bhutto. The public demonstration outside and the protest meetings in the midst of the floggings of the people made them feel that he was being treated unjustly and unfairly. Perhaps this was the factor that made him seek publicity. He perhaps wanted to reach the people. His application which he himself filed on the 18th of December was a desperate step. He may have thought with all his intelligence and experiences as a lawyer that he was facing a farcical trial. It may be he wanted to publicise the injustice he sincerely thought he was suffering at the hands of the Judges. But the ground was cut under his feet. The Court was sensitive to the allegations and complaints made against it and so they heard him in Chambers and dismissed the application without any publicity. In the first place matters need not have deteriorated so far, in the second place even at some stage both Counsel for the defence and prosecution could have been called and told about the inappropriate steps taken by the accused to come to an open confrontation with the Bench. The complaints were far too many and far too serious and the Judges could not be Judges of their own cause. Really they were called upon to consider allegations against their own conduct. There were two remedies open to Bhutto to go to the Supreme Court by way of a writ of Prohibition or to bring these matters up in appeal in case there was a conviction. Surely all the averments in the application involved the Judges and how could they have been Judges of their own cause? Were they super-human to say “*mea culpa*”? Would they have ever made an order against themselves and say “justice must appear to have been done. We have failed to give that impression. We therefore transfer this case which is now reaching a conclusion to another Court for the trial to commence de novo in another Court?” Anyway this application was made “*in extremis*” and in utter despair without the

slightest hope that they would obtain a transfer. It is a somewhat unique development in the history of criminal cases. Surely the Court need not have been put to this position, if they followed what the Chief Justice professed to Mark Tully in the famous interview over the BBC about the great Common Law Traditions and justice would be done for all the world to see. What happened after the 18th of December was a pathetic situation for any Court to be in and perhaps a fatal situation any accused to be in.

Thereafter, the Court assembled in the Court room for recording the evidence of a prosecution witness. Bhutto's Counsel said he had no more questions to ask as his client had instructed him not to participate in the cross examination. Mr. Awan stated from the Bar that his client had withdrawn his power of Attorney. Bhutto through his Counsel placed on record a written statement drawn up by him that he did not want to defend himself in view of the conduct of the Court that day. The conduct referred to was perhaps the hearing of the petition in the secrecy of the Chambers, its dismissal and Bhutto being ordered not to indulge in irrelevant arguments and not to make a political speech. He was ordered to sit down and the petition was dismissed. Since the hearing was in Chambers it can only be surmised that Bhutto perhaps received some very rough treatment.

It is a matter for serious consideration here whether the Court could hear such motions in Chambers or not when the law expects trials to be in public-The Court certainly in its discretion-can order "in camera" proceedings but in this case it is inevitable to form the view that the Court was fighting shy of the public and it is possible to say so with respectful regret. It is altogether unfortunate that one thing upon another led to this climax and crisis. Justice appeared to have come to a standstill.

Then all requests to Counsel to appear for the accused at state expense failed. No Counsel could be foisted on an unwilling accused. So the Court directed the accused to conduct the case himself. The accused, however, refused to participate in the proceedings after the 10th of January 1978. As we stated earlier this was a tragic situation for both the Court and accused.

When the stage was reached to examine the accused under section 342 of the Code for purposes of obtaining his statement as provided by the law, the accused stated that since he was boycotting the proceedings he would not be offering any defence. He would however make a statement only (1) about the reasons why the present case was fabricated against him and (2) why he apprehended that he would not get a fair trial and any justice in Court. The accused's statement had been partly recorded on 24th January 1978 in open Court.

On the 25th January 1978, the Court noticed that a few of the supporters of Bhutto were found shouting and yelling in the corridor outside the Chief Justice's Chambers. Now the Court was faced with an additional reason to apprehend a disturbance in court and therefore it made its order that the trial will proceed "*in camera*" and the public will have no access. Even the Supreme Court when it expressed its views in its majority judgement referred to the justifiable "apprehension" of the High Court. The apprehension of the accused that he was not getting a fair trial far outweighs the apprehensions of the High

Court Judges created by the judicial behavior of the presiding Judge. Did such apprehension of the Court arise not out of fear but out of self importance? It is really unfortunate that Judges who are expected to be fearless, who are clothed with authority to maintain law and order and who have all the law enforcing authorities at their command should entertain “apprehensions” and “reasons” for their “apprehensions”. It is further unfortunate that they should have been placed in a position to be embarrassed before the public. All the “scandalous” allegations to undermine the dignity of Court were allegations that the accused dared to repeat in the face of the Court with which his Counsel did not dissociate himself. They were about events that according to him and his Counsel happened in open Court. Most of the allegations were not disputed. Counsel of standing were present when the incidents complained of took place in Court and all this was referred to in the Supreme Court. However unfortunate and ugly these incidents were, at least a good many of them, actually happened in open Court; complaints regarding undisputed facts are always not within the area of contempt however “scandalous” they may appear to be. If such incidents which were undisputed did take place, it is not the accused only who devalued the dignity of Court but the Court was also more than responsible for its own devaluation. Justice is not a cloistered virtue any longer. It can stand firm to the public gaze. It never runs away from the public. It is embarrassed by nothing. Justice needs no protection nor security from the people. But Judges may need them, no doubt. We may refer to a Judge of the Supreme Court in Sri Lanka who when he travelled outside his official business very often used the Public transport. He was advised by some of his friends on the Bench that it was a hazard to which he replied “It is not enough for a Judge to be fearless only on the Bench. He must be fearless on the streets and in the bus if anyone harms me, it only means I deserve it”. This Judge is now retired and one can sometimes see him walking on the streets of Colombo in broad daylight like Diogenes the Greek Philosopher who walked the streets of Athens more than 1500 years ago!

The public are certainly excluded in certain circumstances and that is in the interests of parties so that their intimate private and personal problems are not open to the public gaze and curiosity but hardly ever to protect the dignity of Court, or the vanity and sensitivity of Judges at the expense of an accused. The law of contempt does not reach out to punish a man with a legitimate grievance. For instance, a great criminal lawyer in Sri Lanka was provoked by a Supreme Court Judge presiding in the Assize Court unduly, harshly and severely examining the accused when he was giving evidence on his own behalf in a Jury Trial. While seated, he made an observation loud enough to be heard by the Jury and the Judge. “It is most unfair for a Judge to cross-examine the accused in this manner”. The Judge was furious. He remarked “Mr. X, I don’t want you to make loud comments”. Mr. X ignored this remark and when the judge continued to harshly examine the accused Mr. X repeated his earlier remark whereat the Judge said “Mr. X, will you repeat what you said just now?” Mr. X got up put his chest forward, raised himself to his full stature (he was short in height) and loudly said “I repeat, with great respect, My Lord, what I have been saying more than once seated as I was at the Bar Table. The Judge is acting most improperly. He has taken the role of a prosecutor. He is cross-examining the accused even before the prosecutor. He is cross-examining. I repeat it and I shall repeat a hundred times, with great respect, My Lord”. Counsel said everything and more than

what he wanted to say but he spiced and punctuated all what he said with the traditional words “with great respect”. The Court was silenced. No one would advocate or champion rudeness, insults and unseemly conduct either from the Bar or from the Bench. It prevents the smooth administration of justice. It does nobody any good. It harms both the individual and the institution.

Even on the 28th of January, when Bhutto wanted to consult Counsel whether the proceedings could be held *in camera* the Court reminded him that he was given an opportunity to see his Counsel only on the question of his statutory statement and not on the question of *in camera* proceedings. It agreed to give the time allotted in the well known song “only 5 minutes more”. All this time limitation to 5 minutes and the limitation to seeing Counsel only on one specific matter could have been if not graciously at least prudently avoided. How petty in a murder trial, anyway. Thereafter the situation further deteriorated. His incomplete statutory statement was then recorded. The accused re-iterated that he would confine his statement only to two issues (1) the reason for his lack of confidence in the fairness of the trial (2) The reason why this case has been fabricated against him. He said he was not going to call any defence. The question may be asked whether the two aforesaid issues were not material to the defence of the accused? Can it be said that the accused has no one to complain to? He could have gone to the Supreme Court by way of a Writ of Prohibition or reserved these points for appeal if he was convicted. It may be said that if he went in appeal to the Supreme Court, he could have been asked why he did not place these matters on record in the High Court. The High Court, however, was not going to hear his reasons for the lack of confidence in the fairness of the trial and find against themselves.

It is unfortunate that the circumstances were not at all helpful for the Judges to adjudicate on the main case against Bhutto objectively and dispassionately as could be seen from their judgement.

Bhutto in his statutory statement stated that he did not know Mien Abbas personally and never spoke to him. He had knowledge of him only in 1976 when Masood Mahmood told him that a very competent officer of his had suffered a heart attack and was hospitalised with the result that his own work had increased.

It was in this total context that the proceedings in the High Court concluded. All the accused were found guilty and sentenced to death on the 18th of March 1978. It was the unanimous view that the prosecution had proved its case “to the hilt”. Bhutto was held to be a “compulsive liar”. They hardly examined the evidence of the prosecution witnesses and entertained no doubts about the testimony of Masood Mohamed which was in their view amply corroborated. The alleged bias of the Judges was revealed in the judgement. In the first place Bhutto was always referred to as the “the principal accused” which was a subject matter of complaint to the Supreme Court. By itself it cannot be said that it was due to their being prejudiced. They had, not incorrectly on the evidence of Masood Mahmood, the position that Bhutto held as Prime Minister and due to the episode in Parliament on the 3rd of June 1974 which according to the prosecution triggered off this conspiracy, called him the Principal accused. But at the end of their judgement, the High

Court had gone out of its way to make gratuitous observations in paragraphs 610 to 616 regarding the personal beliefs of the appellant and delivered a sermon as to the mode of conduct prescribed by Islam for a Muslim ruler. It had described him a Muslim only in name. It referred to his abuse of power and to his insane craving for self aggrandizement and perpetuation of his rule. It referred to him as an arch culprit and a “compulsive liar”. It went on to say that “before a person seeks election to the office of the Chief Executive of Pakistan he should order his own life and before he undertakes to observe the principles of democracy, freedom, equality, tolerance and social justice he should inculcate these qualities himself”. It went on to say “that a person who considers the Constitution and the law as a 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”.

This judgement was most unfortunate. The judgement contained expressions of feelings on matters outside the case. It was unfortunate again that it ended on a note which would have been more appropriate for an Election Speech. These words were wasted as there was to be no election for eight years thereafter. The judges commented on counsel’s responsibilities to court and lamented about the need for amendments in the Law of Contempt.

A comment may be made that no amount of amendments to the Law of Contempt will ever ensure a fair trial unless not counsel only but the Judges too realise their responsibilities towards institutions which stand for Law, Justice and the Rule of Law. Any extension to the Law of Contempt may put justice in peril.

When the High Court made a finding that Bhutto was a “compulsive liar” - it was not on any testimony Bhutto gave in Court as a witness in the box. They made a finding that he was a “compulsive liar” on issues which Bhutto had with the presiding judge. In other words, they appear to have been judges of their own cause.

The majority judgement in the Supreme Court ordered the deletion of six paragraphs in the judgement and observed that “they could safely be deleted without in any manner affecting its integrity, meaning and logical sequence”. It is not a question of amputating these offending paragraphs “safely” without damaging the integrity, meaning and logical sequence of the judgement. What is disturbing is that these feelings were in the judicial minds of the High Court judge during the exercise of their judgement. For whose benefit or consolation was this order for deletion? What was the purpose? The written judgement as it stands today in an amputated form does not contain these effusions which reveal the feelings of the Judges and it does not give any relief to the roan who was sentenced to death by Judges who had all these irrelevant and prejudicial feelings against him. The mental processes that went on in the minds of the Judges could have played their part although they leave no longer any trace in the judgement after the deletions and amputations made by the Supreme Court. It passes all understanding that a judgement containing totally irrelevant and unfair observations wholly prejudicial and totally unfair to the accused should have been allowed not to stand after the skilful! surgery excising and amputating the offending portions when the findings and been poisoned with venomous judicial prejudice. To say the least with great respect the Supreme Court

indulged in a harmful and meaningless exercise. Certainly it was not safe to allow the findings of the High Court to stand. The dissenting Judges would have done better if they had answered the issue of bias which again could have been answered dispassionately and objectively. Unfortunately they avoided the question of bias as they acquitted the accused. So, we have no collective finding of the Supreme Court on the following two important issues (1) Bias and the unfairness of the Trial (2) Political motivations and considerations.

CHAPTER X.

THE SUPREME COURT AND THE APPEAL

The first contact the Supreme Court had with the affairs of Bhutto after July 1977 was when Begum Nusrat Bhutto presented a Habeas Corpus application in the Supreme Court challenging the orders of the Military Authorities for the arrest of her husband as unconstitutional and illegal. This application was filed on the 20th of September 1977. It would be remembered that the judges of the Supreme Court had taken an oath of allegiance to the 1973 Constitution. The Government challenged the jurisdiction of the Supreme Court to question the said orders made by the Chief Martial Law Administrator. Two days after this application was filed General Zia announced that the office of the Chief Justice had fallen vacant as Yakub Ali Khan the last Chief Justice had retained the office after his normal retiring age. He was accordingly replaced by Anwarul Haq as Chief Justice. The very next day on the 23rd of September 1977, the new Chief Justice took his oath of office with the other Supreme Court Judges omitting the paragraph in the oath laid down in the 1973 Constitution whereby the Supreme Court Judges swore “to preserve, protect and defend the Constitution”. From now on therefore they ceased to function as Constitutional Judges and were absolved from keeping faith to the oath they had earlier taken. (vide Keesing’s Contemporary Archives).

The question whether Anwarul Haq was constitutionally appointed as Chief Justice in terms of the Constitution arises and the answer has to be perhaps in the negative. This question and answer applies to the other Judges as well. In this respect their decision in the Begum Nusrat Bhutto’s case delivered on the 10th of November was an adjudication which involved their own interests with regard to the validity of their holding office. In any case if they accepted the view that the 1973 Constitution was only “in abeyance” why were they made to desert the Constitution in the hour of its peril by their having to abandon their allegiance to the earlier oath taken “to protect, preserve and defend the Constitution”? Another interesting question for the jurists to consider is, what would have been the position, if a Writ of *Quo warranto* application was made challenging the authority of the Judges of the Supreme Court to hold office and function as Judges of the highest court and if this application was made soon after the new Chief Justice was appointed and all the Judges took their new oath omitting the vital part of their old oath. Was such an application made before the hearing of the application of Nusrat Bhutto? If not, it is unfortunate that today we have not been educated by the judgement of the Supreme Court on this very important issue, i.e. the constitutionality and the authority of the Supreme Court. But who was to decide the *Quo warranto* application - the Judges themselves were in issue on the legality and constitutionality of their tenure of office? Jurists perhaps will say quite rightly someday that the finding in the Begum Nusrat case was made by the Judges who judged their own cause too!

On the 22nd of October 1977, Bhutto presented himself in the Supreme Court and made a three hour speech supporting the petition for his release. On the 10th of November 1977 the Supreme Court dismissed the Application for Bhutto's release and rejected the submissions on the unconstitutionality of his arrest and detention. It held that the imposition of Martial Law although an extra constitutional step was validated by the "doctrine of necessity" as the Constitutional and moral authority of Bhutto's Government had completely broken down. In their order the Court took note of General Zia's pledge that elections would be held as soon as possible after the trial and that this pledge will be redeemed. The Supreme Court takes credit for waiting patiently for more than 8 years for this pledge to be redeemed and on "the doctrine of necessity" it has carried on for so long owing no allegiance to any Constitution and having broken its own pledge to keep faith to the 1973 Constitution. Was it a logical extension of the Doctrine of Necessity? Was it a perpetual ever lasting necessity? The jurists can answer this question. Was the Constitution in abeyance or in Bhutto's words preserved like pharaoh's mummy!

It is in this set up, that the trial of Bhutto was taking place in the High Court where of course the traditional laws survived. The Criminal Law, the law of Evidence and the Criminal Procedure Code were in no way affected in any manner whatsoever. Judicial tradition, the principles of justice, and principles of fair trial were not interfered with. So that there was no reason for the Judges of the High Court to feel that there was any compulsion on them to depart from the normal judicial traditions. Did the High Court give the appearance that there was a "fair trial" before them? On the other hand the Supreme Court while 3 Judges were silent on the matter, held that there was a fair trial and there was no bias and Bhutto received substantial justice. We may mention that Bhutto made an application about the constitution of the High Court which was to hear his case, and among other grounds that by the Acting Chief Justice being appointed the Chief Election Commissioner he had ceased to hold the office of Acting Chief Justice and that there were other reasons for personal bias.

The Supreme Court directed that this application be made in the High Court. This was before the 11th of October 1977 when the Supreme Court had still to hear the much larger question of the legality and constitutionality of the orders of the Chief Martial Law Administrator. The baby passed to the High Court was an unwanted one and a source of embarrassment to the Court.

After the conviction and sentence on the 18th of March 1978, Bhutto appealed to the Supreme Court on the 25th of March 1978. Outside the court we know what was going on in the country - demonstrations, protests, flogging, sealing of printing presses, clemency appeals from foreign countries (vide Chapter III) and elections being postponed. The distribution of an edition of Musawat had been stopped after publication of a letter of Bhutto to Bakhtiar describing the military authorities as "*dirty, miserable and stinking men*". All copies of the Musawat containing reports of Bhutto's appeal to the Supreme Court were seized on the 27th of March 1978. On the 1st of April 1978 while there was turmoil in the country, the Supreme Court rejected an application of Bhutto for relief from condition in his cell in Death Row, which his counsel the former Attorney General

of Pakistan described as horrible and insanitary. The hearing of the appeal was fixed for the 6th of May and the application for 2 months time was refused. However, the appeal was later postponed for the 20th of May, 1978.

In the meantime, Mr. Bhutto in a letter to the Supreme Court appealed to the Chief Justice Anwarul Haq to withdraw from the case on the grounds that he had publicly criticised Bhutto's Government after it fell, that he had referred to General Zia as "a National Saviour", that he had for many years closely associated with the Chief Justice of the Lahore High Court who had found him guilty and also for the reason that Anwarul Haq acting as head of State during Mr. Chaudhury's absence abroad had temporarily merged the military executive and the judiciary. Among these grounds, the first and third grounds were quite substantial grounds. Anyway this application was rejected by the Chief Justice as "unfounded and based on a misunderstanding". The Chief Justice said that he was going to appoint a full Bench of 9 Judges to hear the appeal and he will be only one of the 9 Judges and his views would be the views only of one of the 9. It must be mentioned, however, that the Chief Justice and other Judges gave a very good hearing to the appellant and there could be no allegation against their judicial behavior. Bhutto and his Counsel were given a very patient hearing. The hearing of the appeal continued from the 20th of May 1978 to the 23rd of December 1978. The judgements were delivered on the 6th of February 1979. The Judges were divided 4:3 and Bhutto's appeal was dismissed.

Man proposes but God disposes and the most unexpected happened twice to reduce the number of Judges hearing the appeal to 7. Quaiser Khan J. retired from the Court after he reached the age of retirement on 30-7-78 and another Judge Waheeduddin J. was incapacitated from functioning on the Bench having suffered a cerebro-vascular stroke on the 20th of November, 1978. There was an adjournment for 3 weeks and since he had not fully recovered, the hearing was resumed before 7 Judges. At one time there were 8 Judges and what would have happened if they were divided 4:4? Even that chance was denied to Bhutto and the other accused Mian Abbas. The Chief Justice Anwarul Haq presiding wrote the judgement dismissing Bhutto's appeal and confirming the conviction and death sentence. Mohammed Akram J. and the 2 other judges of the Supreme Court agreed with the judgement of the Chief Justice. They were Karam Elahee Chauhan and Nasim Hassan Shah J.

Three Judges on the other hand allowed the appeal of Bhutto and the 2nd accused Main Abbas. They were Dorab Patel J., Mohammed Haleem J. and Safder Shah J.

All the Judges dismissed the appeals of the other accused. The Chief Justice Anwarul Haq's judgement was the only judgement written with which the 3 other Judges agreed. On the other hand all three Judges who acquitted Bhutto wrote separate judgements. Two of them wrote separate judgements. Two of them wrote lengthy judgements. The judgement of Haleem J. was pointed and brief. It may be of interest to note that Haleem J. is today the Chief Justice of Pakistan and it is a matter for appreciation that his acquitting Bhutto never stood in the way of his being appointed as Chief Justice later.

Whether one agrees with the final minority judgement or not, there is no doubt that the 3 judges who wrote the minority dissenting judgements were fearless and independent. The unfortunate feature in the final outcome is that one judge made all the difference and this situation was never anticipated. It was a strange quirk of fate indeed that brought about this narrow decision.

It is not out of place to recall the events that were taking place in the country outside Court. The hearing of the case affected the politics outside and the politics outside had an indirect effect on the accused and Counsel. It is to the credit of the Court, however, that a perfectly cool atmosphere was maintained throughout the hearing with all the proprieties observed by the Bench, the Bar and the accused as it ought always to be. The tensions were removed except the oppressive feeling on the part of the accused that the hearing of the appeal was during a regime which was very hostile to him and over which the Court had no control. Bhutto expected justice from this Court and it may be said till the judgements were delivered, many expected Bhutto to be released. But it was not to be.

Anwarul Haq C.J. examined the allegations made about the bias the High Court displayed at the trial and the irregularities but stated that the High Court had in no way denied the appellant of substantial justice and he would not say that justice was not done. He, however, deleted 6 paragraphs in the judgement which referred to extraneous matters which were no part of the case. He accepted Masood Mahmood's testimony which he said was amply corroborated by circumstantial evidence. Mr. Bhutto, he said had a very strong motive to do away with Mr. Kasuri because of their strong political differences. It was his view that the prosecution had fully succeeded in establishing its case.

Safder Shah J. had serious doubts and did not accept the evidence of Masood Mahmood. He said that there were 15 attacks on Kasuri over a period of nearly 4 years and in none of the complaints he made to the Police or in the privilege motions he moved in Parliament did he accuse Bhutto as an instigator. Even after the attempt to attack him in Islamabad in August 1974, he did not mention Bhutto. He thereafter made efforts to regain the confidence of Bhutto. He held that there was no corroboration of the Approver's evidence. He was not at all satisfied with the Approver's evidence which he disbelieved.

Dorab Patel J. was also critical of the credibility of the approver Masood Mahmood's evidence. He disbelieved him and found no corroboration. Haleem J. (now the Chief Justice of Pakistan) observed dealing with the approver's evidence "an overall examination of his evidence has led me to conclude that it is not of the quality on which reliance can be placed. The High Court has construed the substantial omissions and improvements in his evidence as details or omissions of matters which have been brought on record by the Public Prosecutor putting specific questions. In my view these omissions and improvements vitally affect his truthfulness and, therefore, in resolving it in favour of the prosecution the High Court has given an illusory value to his evidence..... I am firmly of the view that his evidence is unnatural and thereby lacks its guarantee to inspire confidence. ...Such being the state of evidence, it does not appeal to wisdom and I would therefore disbelieve him...." He held that the corroborative evidence was inconclusive.

Four learned Judges therefore held views about the prosecution case diametrically opposed to the views of 3 learned Judges, on a pure question of fact. It does not disturb one's conscience when Judges disagree like this on a question of law. But when they so disagree on a question of fact which involves the question of life and death for a human being it is a matter of grave concern for other human beings. Is there something wrong in the system where 4 learned judges held one view that they believed Masood Mahmood and 3 equally learned Judges held that they could not believe him. It naturally leads to the next question what is truth and what is falsehood? How can one find whether a man is speaking the truth or speaking a falsehood. Judges do not have a power of divination nor are they crystal gazers. They are human and remain human despite all their learning. Learning gives them all the intellectual equipment to decide questions of law and sometimes even on questions of law there are sharp conflicts of opinion. But questions of law remain for a rational and intellectual scrutiny, and sometimes a minority dissent has been later found to be correct. It has been found that sometimes majority judgements had gone wrong in legal reasoning and that the minority dissents were right. Judicial precedents have in a few instances perpetuated utterly wrong decisions on The altar of the law of '*Stare decisis*'. That is on matters of law.

On a question of fact however, the law and the principles of justice give a guide line to Judges. Very often there are counsel appearing for the contending parties. Judges listen to them. Judges have no brief to hold for anyone except for themselves in the tribunal of their own conscience. They are in a superior position to either Counsel appearing before them because they are at an advantage to see the totality and listen *limine* points of view. They will examine the submissions and for good reason accept some and for some good reasons reject the others. How is it then that Judges of ability, honesty and experience came to hold different views on the credibility of one witness? According to four of them, the evidence of the witness was acceptable without any reasonable doubt.

According to the other three, it was not only unacceptable but his testimony was unnatural and full of infirmities and it did not survive their examination. The people had to accept the verdict of the majority and the fatal consequences flowed. That does not mean that the people cannot examine the reasons for the verdict. The consequences of course must inevitably flow even from a wrong verdict. That is the rule of law. The question lies open for the learned Jurists to examine how the rule of law operates when there is no rule of the Constitution but only a rule of men. These questions are riot within the scope and objective of this book. The facts are before the people and there is no rule nor any power on earth which prevents there from examining these verdicts and the reasons. In other words when Judges get into conflict in their views, the people for all the more reason can judge the judges. It is nice if the people's judgement and evaluation of Judges stand the test of the traditional values of justice and fairplay. There were no incidents in the Supreme Court and Bhutto was given a full opportunity to address the Supreme Court which he did for 4 days from the 18th to the 21st of December 1978. The hearing of the appeal concluded on the 23rd of December, 1978. Bhutto's Counsel Mr. Yahya Bakhtiar, the former Attorney General, had already appeared for him and had argued his appeal, it must be mentioned that on all four days he addressed the court,

Bhutto expressed his full confidence in this Court and also his gratitude for its gesture in having allowed him to address the court after his Counsel had fully argued his appeal.

It is quite evident that Bhutto found his appearance in the Supreme Court a refreshing change from his experience in the High Court.

The events outside the Court were settling down in the direction of no return to elections. On the resignation of President Chaudhury, General Zia had been sworn as President on the 14th of August 1978. Pakistan was 'moving' towards denationalization of Industries, setting up of foreign Banks and the return to the old order. Everyone knew where he stood and this led to a sort of stability in the country.

While Bhutto's appeal was being heard, White Papers were being published and distributed both in Pakistan and other countries abroad about all the alleged misdeeds, corruption, *etc.* during Bhutto's regime with special reference to how he used the Federal Security Forces as his 'personal Gestapo' and also his interference with the freedom of the Press and the independence of the Judiciary. Bhutto replied in a statement of 80,000 words denying the allegations against him in the White Papers and said "we did not flog journalists nor did we steal the printing presses of Newspapers". The reference to the Federal Security Force and the Gestapo when the appeal was pending was a clear contempt of Court. It could have prejudiced the minds of the judges. No one can say how far it affected their judicial minds - dealing with Government publishers for contempt was out of the question in the set up. On the other hand the Supreme Court graciously allowed Bhutto to let off his steam and so there were no tensions. Bhutto applied to be allowed to say his piece after his Counsel had concluded his submissions on his behalf. The Supreme Court generously allowed this application. Bhutto was satisfied and expressed his confidence in the Court. He was allowed his say and he spoke for 12 hours. He referred to the political motivation for this case to be fabricated against him. Hindsight it could very well appear that this was no more than a sort of *allocutus* afforded in some legal systems to an accused before he is sentenced to death. The Court gives him the last say before the sentence of death is pronounced and this communication he is told will be communicated to the authorities concerned. He is asked why sentence of death should not be carried out. But unfortunately Bhutto was given this opportunity to speak out in open court as though what he said was to be among the matters the judges were going to consider and he made use of this opportunity to attack his political enemies and the political motivations. One way of looking at this permitted speech is that it totally ruined any chances of a commutation of the death sentence, thereafter. Bhutto on the other hand wanted to speak out his mind and expected the judges to view the prosecution case in the light of his submissions and his statement. Of course he could not be cross-examined on his speech. His speech was an "extra" to the submissions made by his Counsel. Bhutto wanted this opportunity to be given to him under section 342 of the Criminal Procedure Code as such an opportunity was in effect denied to him in the trial Court. When the opportunity was given to him by the Supreme Court, did they accept the position that a mandatory provision to provide him with this opportunity was denied to him? It is only on this basis that the application was made and could have been allowed. One is reminded of doctors, when they find they have done their best and the patient has

no chance to recover, telling the patient, “You can eat and drink whatever you like”. Was it a matter of judicial diplomacy to have allowed him his say? - to say whatever he liked? Did it gain any publicity at all - that is the question. There was no publicity given to his speech.

The answer for all this is found in the judgement of Anwarul Haq C.J., “Although in the grounds of appeal as well as in the oral submissions made at the Bar, considerable emphasis has been laid on the point that the present case was politically motivated in the sense that there was an international conspiracy to remove the appellant from power and to eliminate him both politically and physically it is clear that these matters are extraneous to the record of the case and to its judicial determination. The fate of the present appeal must depend not on the motive of those who re-opened the investigation of the case on the promulgation of Martial Law on 5th of July 1977, but on the strength or weakness of the evidence adduced in support of the allegations made by Ahamed Raza Kasuri in the First Information Report made by him as long ago as the 11th of November 1974 minutes after his father had breathed his last owing to injuries sustained during the attack on the complainant’s car. If the requisite evidence satisfying the legal and judicial standards applicable in criminal trials of the present kind, is available on the record to prove the guilt of the appellant beyond reasonable doubt then the duty of the Court is clear, irrespective of the political consideration which might have led to the overthrow of the appellant’s government in July 1977 and the re-opening of the present case thereafter. The converse is equally true. If sufficient evidence is not available to sustain the conviction recorded against the appellant, then they must be set aside regardless of any political consideration. On this view of the matter we did not think it necessary to go into details of the alleged international conspiracy alluded to by Mr. Yahya Bakhtiar”. Although the above submissions referred to the submissions made from the Bar by Counsel, Mr. Bhutto’s speech in a big way referred to the political motivations for a case to be framed against him. So that the above observations refer to Mr. Bhutto’s speech as well which spread over 12 hours for 4 days.

Bhutto was thankful to the Court and expressed his confidence in the Court on each one of these four days. It would appear now that Bhutto was justified in expressing his gratitude for the Court giving him an opportunity to make a long speech but he was misreading the situation if he thought the Court was going to consider and take into account anything of what he said in his long speech, if it referred to politics. It was only the swan song of Zulfikar Ali Bhutto which was so graciously allowed to him by the Court. In no way was it relevant to his case, they held.

It is rather difficult to understand what the Judges meant when they said that the converse applies that if there is no sufficient evidence to sustain the conviction, it must be set aside regardless of political considerations. Is there any Judge worthy of his office who will allow a conviction to stand, on insufficient evidence because of political considerations? Is there any Judge imaginable who would ever say “No doubt, the evidence is insufficient but we must pay due regard to political considerations and therefore we affirm the conviction”. There are the three Judges of this Court who regardless of political considerations set aside the conviction because of the insufficiency of evidence, as they

held. There are also four Judges who thought that the same evidence was sufficient to sustain the conviction and so they did not set aside the conviction regardless of political considerations. The speech of Bhutto was a sort of *allocutus* to be considered by posterity. But then, was this case free of politics? Politics swept away the 1973 Constitution. Politics said that the elections where the chief contending party was the PPP will be held after this case? Politics appointed the Chief Justice and politics made the Judges take a new oath with the allegiance to the Constitution. Politics made the country rock after the 1977 March elections which were alleged to have been rigged. Bhutto's position was that he had no fair trial.

The presiding Judge in the High Court Mr. Justice Mustaq Hussain had a personal bias against him owing to his having been superseded for the office of Chief Justice of the Lahore High Court, and also because he, Bhutto presided in the Central Executive Committee of the PPP which condemned Justice Mustaq Hussain for certain statements about the elections made by him in his capacity as Chief Election Commissioner in August 1977 after the Promulgation of Martial Law. Bhutto pointed out the intemperate unjudicial language used in the judgement of the High Court about his being a Muslim only in name ignoring his contribution to Islam. He had solved the age old Quadiani problem. He had convened the Islamic Summit at Lahore and was elected as Chairman on the proposal of the late King Faisal of Saudi Arabia. He had declared Friday and not Sunday as a closed holiday and changed the name of Pakistan Red Cross to Red Crescent. He was responsible for the adoption of the 1973 Constitution. He submitted that the High Court Judges were too prejudiced to give him credit for his achievements and without any justifications called him a Muslim only in name. The tone of the judgement no doubt further proved the prejudice and bias on the part of the Judges of the High Court against Bhutto. In any case to put it at the lowest the accused had every reason and justification to think that he had not been given a fair trial due to politics. The Supreme Court apart from amputating these observations from the judgement of the High Court did not go further and at least order a retrial if they could have in the totality of the complaints made about the various incidents that happened in the High Court. Bhutto also submitted that he was politically framed. The Supreme Court did not treat the political consideration as relevant but one would have expected them to have examined the evidence of the Principal approver Masood Mahmood in the light of the political events that led to the fall of the Bhutto Government and the undoubted anxiety of the Martial Law Authorities to pursue Bhutto.

The most important man who would have been a threat to the reactionary forces in Pakistan if he had come back to power undoubtedly was Bhutto, and these political considerations could not have been rejected out of hand as irrelevant, in evaluating the investigation and the approver's evidence implicating Bhutto. We cannot be sure that the 4 convicting Judges of the Supreme Court would have come to the same finding had they examined the political motivation to frame Bhutto as was alleged by the defence.

It is difficult to say that the trial of Bhutto in the High Court and his appeal would have gone necessarily against him if he had a fair trial and if the evidence was more closely examined by the Judges who found him guilty without closing and shutting their minds

from the relevant political considerations. As stated earlier it was difficult to write about the Bhutto trial *in vacuo* without setting it in the political context. When the whole case was bristling with politics were the Judges adopting a holier than thou attitude by eschewing all politics? Was it the rule of relevance or the difficulty to deal with the politics which was the factor that determined their avoiding all political considerations?

The Judges failed to realise, that they need not have agreed with Bhutto's politics when they considered the possible political motivations as far as the investigation and the institution of the case against Bhutto was concerned. Should the exercise of the Government functionaries be necessarily attributed to the Head of the Government on the evidence of an accomplice? When the political motivations were urged by the defence, it was not a case of Judges having to involve themselves in politics. They can consider politics as a human factor in evaluating the conduct, credibility and motive of witnesses and investigators. In doing so they need not evaluate the relative merits of the Bhutto regime and the Martial Law regime. Their attention is directed to psychological and human factors in relation to human conduct which leads to fear, compulsion, self interest and survival.

The Supreme Court confirmed the conviction and the death sentence of Bhutto on the 6th of February 1979 by a majority Judgement of 4 to 3.

On the 24th of February 1979 the Supreme Court began hearing a petition presented by Bhutto's Counsel for a review of its Judgement on his appeal with a request that the two of the nine Judges who had withdrawn from the case be recalled. Mr. Bakhtiar submitted that this was the first time that the Supreme Court had failed to agree on a death sentence and the guilt of the accused. The Chief Justice displayed his impatience and anger and shouted at Mr. Bakhtiar to show one single new point of law which had not been argued earlier.

The Supreme Court unanimously rejected the petition on the 24th of March and observed that it was for the Executive authorities to review the sentence of death in the exercise of their prerogative of mercy. Mr. Justice Safder Shah told a Press conference on the 28th of March that the Supreme Court implicitly recommended in their order that the death sentence should be commuted.

It is some interest to know that in Sri Lanka in a Jury Trial before 7 jurors a 4:3 verdict is an unacceptable verdict.

CHAPTER XI

CLEMENCY APPEALS, THE EXECUTION AND THEREAFTER

With regard to petitions of mercy, Bhutto had persistently frowned on any request for mercy and he had strictly forbidden his family and friends to make any such request. However, Mr. Pirzada (Finance Minister in Mr. Bhutto's Government) and two sisters of Mr. Bhutto petitioned President Zia for mercy on 31st March 1979.

In the meantime, there were appeals for clemency from all over the world.

A very humane step was taken by Malik Ghulam Jilani who presented a petition based on a very relevant constitutional point which was ably and fearlessly supported by a young Barrister Mr. Aitzaz Ahsan before Justice Shafi-ur-Rahman in the High Court of Lahore (PLJ 180 (Lahore) 166). It was a writ petition which stated that General Zia Ul-Haq as the Chief Martial Law Administrator cannot deal with any mercy Petition as he is only a *de facto* and not a *de jure* President. In this state of affairs, the execution of the sentence of death could not be carried out by the Jail authorities. The High Court, however, held that what the petitioner was intending to achieve is questioning the authority of the present incumbent of the office of President which he must first do by a writ of *quo warranto*, and he cannot achieve this by collaterally challenging the authority. The petition was dismissed on 17th March 1979. While dismissing the petition, the Judge observed that as a matter of equity, the petitioner was seeking to perpetuate the agony of the convict by keeping in abeyance the exercise of mercy power for one does not know nor has it been made clear as to when a *de jure* President of his liking is to come into existence. This is a strange aspect of law and equity indeed!

There was another inter Court appeal No. 76 of 1979 decided on the 3rd of April 1979. (PLC, 1979 Lahore 564) In this petition the point was taken that the Chief Martial Law Administrator cannot deal with a mercy petition as he was not a *de jure* President. Mr. Aitzaz Ahsan supported the petition and again ably argued the matter challenging the Validity of the President's order No: 13 of 1978 whereunder General Zia-Ul-Haq was holding the office of President. He also argued that this constitutional question could be argued collaterally. The court held that the Supreme Court had validated the Martial Law Regime on the doctrine of necessity and also the authority of the Chief Martial Law Administrator in the Begum Nusrat Bhutto case in 1977. This decision was made for the good of the people "so as to achieve one of the objects of the Martial law, *i.e.* holding General Election as early as possible". Flowing from the decision of the Supreme Court, the President's order No: 13 of 78 was valid. It was their view that on account of State necessity, the President of Pakistan and the Superior Courts continue to function under the Constitution subject to the condition that certain parts thereof have been held "in abeyance". It must be kept in mind however, that the Judges of the Supreme Court omitted their oath of allegiance to the Constitution in their new oath whereby they had

sworn “to preserve, protect and defend the Constitution”. This appeal petition was also dismissed *limine* already on the 3rd of April 1979. Mr. Aitzaz Ahsan requested for grant of a certificate to file an appeal before the Supreme Court which was rejected. Perhaps this matter could have still gone up next day to the Supreme Court but it was not to be.

Before such an application could have been made to the Supreme Court Bhutto had been executed at 2 a.m. in the early hours before dawn of the following day the 4th of April 1979 at the Rawalpindi prison. His body was flown to Larkana in Sind, and buried. The sentence was carried out 2 hours before the time provided by the prison regulations. The customary 48 hours between the rejection of the mercy petition and the execution was not allowed. The wife and daughter were allowed to see him on the 3rd April 1979. They were not allowed, however, to attend the funeral. The Public announcement was made about the execution 9 hours later on 4th of April 1979.

None of the clemency appeals succeeded and Bhutto had to fulfill what was destined for him.

There were many clemency appeals that had been made on his behalf from the time sentence of death was passed by the High Court on the 18th of March 1978. Even before his appeal was heard by the Supreme Court, appeals were sent to General Zia by the Governments of many Moslem countries including Egypt, Libya, Tunisia, Algeria, Turkey, Iran, Yemen, the United Arab Emirates, Oman and Qatar. Delegations from Libya, Algeria and the United Arab Emirates visited Pakistan to intercede for him. Colonel Gaddafi, the Libyan leader was reported to have warned General Zia that he was prepared to go personally to Pakistan to rescue his friend and “brother in Islam” Mr. Bhutto. The Turkish Prime Minister Mr. Ecevit said that Turkey was willing to offer him political asylum if this would secure his pardon. Appeals were also sent to General Zia by the Governments of a number of non-Moslem Countries including Romania, Greece and Australia and by the U.N. Secretary General Kurt Waldheim. Although the British Government did not make any public statement, the foreign Secretary Dr. Owen raised the matter at a meeting with Mr. Agha Shahi, General Zia’s adviser on foreign affairs in London on March 20th. The Chinese Ambassador was reported on April 6th 1978 to have had two meetings with General Zia and one with President Chaudhury at which he had pleaded for Mr. Bhutto’s life. The Standing Committee of Pakistan Organizations in the United Kingdom said that justice had not been seen to be done in Mr. Bhutto’s case and it would ask the Pakistan Government to show the evidence to a team of English Lawyers. Protest demonstrations by Pakistanis took place outside the Pakistani Embassy in London on March 21st and 24th. There were much feelings among the Moslems in Indian Kashmir and there were protest demonstrations and protests on a very large scale. But all this was while Bhutto’s appeal was pending. General Zia had an effective answer - “let the law take its course, and all must be treated equally before the law”.

After the rejection of the appeal in the Supreme Court there were many more clemency appeals and demonstrations. To quote again from Keesing’s Contemporary Archives “following the rejection of Mr. Bhutto’s appeal, ex President Chaudhury visited Rawalpindi on February 11th to plead with the President Zia for his life but was refused

an interview. He therefore delivered a letter for the President, in which he said Implementation of the death sentence is a matter of grave concern not only for Pakistan but for the International community as well. Naturally it threatens the independence, integrity and sovereignty of the motherland and internationally it is bound to aggravate beyond the point of no return instability in an area of extreme strategic importance to the economy and politics of the whole world. He emphasised that the fact that 3 judges had acquitted Mr. Bhutto must raise grave misgivings and referred to the unfortunate coincidence that the four judges who had found against him all came from the Punjab while the three judges who had found in his favour all came from the other provinces. Press and Radio reports of the letter were banned by the military regime but it was broadcast by the B.B.C.'s Urdu languages service. Lt. Col. Tikka Khan the former Army Chief of Staff warned that the hanging of the Bhutto would lead to the disintegration of Pakistan.

Clemency appeals came from many international personalities including Pope John Paul II, the UN Secretary-General, President Carter, President Brezhnev, President Giscard d'Estaing of France, King of Spain, President Tito, the Chinese Prime Minister and the Prime Ministers of the United Kingdom, West Germany, Denmark, Norway, Sweden and Vietnam. The Indian Government officially expressed no opinion though the Minister for External Affairs Mr. Vajpayee said the "hanging of a political opponent was undesirable". 4,000 Pakistanis led by the two sons of Bhutto staged a protest demonstration in London and so did the Pakistan students in Moscow. The P.L.O. appealed, so did the Governments of the Arab countries. The Turkish Prime Minister made his second appeal offering Bhutto asylum. General Zia said that if the Supreme Court upheld the death sentence he would not exercise his prerogative of mercy. General Zia maintained that all are equal before the law, the law must take its course and that during the previous 18 months nearly 400 people had been hanged after he had rejected their petitions of mercy". (Keesing's Contemporary Archives). There is no record that Sri Lanka lodged any appeal nor did Desai's Government.

It may be mentioned that Bhutto was hanged before the other four condemned men in the case. A point was made that three of them had their appeals dismissed by all the seven judges of the Supreme Court, yet Bhutto was the first to be hanged.

All these clemency appeals were ill-timed before Bhutto's appeal was dismissed and they were really asking for Bhutto to be treated as a special case. There was no valid argument against the rejoinder of General Zia that all are equal before the law.

It was understandable if they had appealed on a principle that death sentences should be abolished in which case, the clemency appeals should have covered the other four condemned men. Even after the appeals were dismissed, with all the demonstrations, protests and criticisms, General Zia-Ul-Haq continued quite rightly to maintain that he had to accept the decisions of the judges and no one was above the law. In his view, the law had taken its course and no one could be given special treatment.

Ultimately, it is the judiciary and judicial system alone that has to take the full responsibility for Bhutto's conviction and execution. The question whether their judgements were right or wrong remains for the people to answer. Of course the only answer to the question whether Bhutto had a fair trial has to be an emphatic "No".

General Zia in an interview on April 5th declared "I have tried to show that nobody whether high or low is above the law" No one can quarrel with him for holding that philosophy!

The civilian politicians dissociated themselves from the executive. The execution was condemned throughout the world, and there were messages of sympathy from many world leaders.

There was the report of the Daily Telegraph correspondent who was present at the graveside of Mr. Bhutto on the 40th day after his burial on the 11th of May when 100,000 people from all over Pakistan gathered, "I have never before, on any reporting assignment, known such strong emotion, such an electric atmosphere - we were borne to the graveside on a veritable sea of chanting, mourning humanity, a tidal wave of emotion and of condemnation for the men who hanged Mr. Bhutto". He also commented that some of the mourners shouted Sindhi Desh (Free Sind) - a demand that Sind should secede from Pakistan.

CHAPTER XII

SOME COMMENTS

The former Attorney General of the United States, Mr. Ramsay Clark visited Pakistan during the trial and he later published his assessment of it. He questioned why two judges of the High Court, who had sometime earlier granted the Habeas corpus petition were excluded from the Trial Bench and why on the other hand the Chief Justice had included himself despite his dispute with Bhutto when he was superseded. Mr. Ramsay found this allegation against Bhutto and the evidence of the Chief witness to be “more than suspect and the Chief Justice’s prejudice against Bhutto spread throughout the 145 page decision”.

The London Times carried an editorial titled “He would become a Martyr”. It is said that the trial was a political trial in reality. It observed that not every Court would have found that evidence as conclusive and incontrovertible as the Punjab High Court did but that was properly a matter for the Supreme Court to determine. It refrained from commenting on the merits of the case but made the observation that had Mr. Bhutto been acquitted he would have emerged a more dangerous political opponent than ever. Everyone was well aware therefore that a verdict of guilty was what the new regime wanted and meanwhile the regime has shown itself ready to deal firmly and ruthlessly with political opposition in any form. The Court was thus deliberating under heavy political pressure. “It may be that it did not in fact affect its conclusions but inevitably it will affect the willingness of Mr. Bhutto’s supporters to accept these conclusions”, it said. A local newspaper quoted the following report from Bonn:

The Frankfurter *Allegemeire Zeitung* (conservative) commenting on the death sentence passed in Pakistan on former Prime Minister Zulfikar Ali Bhutto said in an editorial, “How is it then possible after the overthrow of Prime Minister Bhutto his greatest political rival Pathan leader Wali Khan found guilty by a Pakistani court of high treason and sentenced to be lengthy prison term, has been set free? - one cannot but suspect the Pakistani judges can read the desires of whoever happens to be in power at the time - The judge who presided over the Lahore High Court which sentenced the former Prime Minister to death showed bias on several occasions whether or not he committed the crime of which he stands accused, Bhutto has not received a fair trial”.

One is reminded of the observations once made by Mr. D.N. Pritt Q.C. the great English lawyer that the Executive rarely interferes with the Judiciary but some Judges know what judgements please the Executive and their judgements are often in conformity with their respective judicial philosophies which are rarely against the establishment.

Amnesty International’s position as regards Bhutto’s case:

“The New government has introduced serious restraints on the independent functioning of Pakistan’ s highest judiciary. AI has said that these amendments “deprived the high judiciary of their principal means of effectively and speedily remedying violations of individual liberties”.

It commented on the order of the 5th of July 1977 “The fundamental rights conferred by the Constitution and all proceedings pending in any court in so far as they are for the enforcement of any of those rights shall stand suspended”. AI noted, however, that the Government’ s order “includes the suspension of the right to life, the right not to be subjected to torture or to cruel, inhuman or degrading ding treatment or punishment, the freedom of thought..... These are rights from which no derogation is possible, even in times of a public emergency threatening of life of a nation as defined in Article 4 of the International Covenant on Civil and Political rights”. The AI delegates have rioted the importance and values of the judgement of the Supreme Court in the Begum Nusrat Bhutto case it noted with anxiety the consequences of the particular difficulties the judiciary may find itself in a country of tension under a military rule.

“AI believes that it is therefore important that all safeguards against such possible influences be taken and recommends that international observers from qualified international organisations be assured access to all further stages of the trial including the stage of appeal. It regrets the Lahore High Court’s decision to conduct the last stage of the trial proceedings’ “in camera”.

“AI believes that Mr. Zulfikar Ali Bhutto like other political prisoners, has the right to a fair and open trial and should be held in conditions which comply with the United Nations standard Minimum Rules for the treatment for Prisoners. During their visit, the AI delegates discussed with Government officials the reports it had received prior to their visit that Mr. Bhutto was not being given proper treatment in jail. In order to verify or deny these reports, AI requested the Chief Martial Law Administrator for permission to meet Mr. Bhutto in jail. AI was offered the possibility of meeting Mr. Bhutto in Court, an offer which AI delegates declined since it would not enable them to make an on the spot evaluation of the conditions of Mr. Bhutto’ s detention. The Government refused the AI delegates permission to meet Bhutto in jail. AI therefore was unable to satisfy itself that Mr. Bhutto is being held in conditions which comply with International Standards. AI is very much concerned at the government’s decision to refuse the AI delegates permission to meet Mr. Zulfikar Ali Bhutto in Jail”. It will be noted that on the 1st April 1978 the Supreme Court rejected an application by Bhutto supported by his Counsel, the former Attorney General of Pakistan for relief from the conditions in Death Row, which Mr. Bhutto described as a horrible and insanitary place in a cell said to be 10 feet by 7 feet.

CONCLUSION

The case and the trial, the appeal and what followed have been revealed to the reader. In the words of Lord Denning, there has been a cutting out of the dead wood and trimming off of the side branches, to prevent the readers from losing themselves in the thickets and brambles. In some measure the case against Zulfikar Ali Bhutto in its proper context has been outlined.

Bhutto's trial will go down to history as the most important criminal trial of this century. It has many lessons to teach the students and teachers of law and of course the Judges as well. There is however a danger that it can be swept under the carpet and be cast away into the limbo of forgotten things.

To sum up, the Judges of the Supreme Court accepted the position that the Martial Law Regime was a deviation from the Constitution which had not been *limined* but only kept "in abeyance" out of State necessity to ensure the smooth working of the elections. Yet for one year and more, the elections had not been held after Bhutto's appeal was dismissed. The Constitution was in a fairly permanent state of abeyance. The judges ceased to owe allegiance to the Constitution "to preserve, protect and defend the constitution". The question may be asked whether for the purpose of holding elections, for the stability of the country and the independence of the judiciary the rights guaranteed under the Constitution such as the right to life, the right not be subjected to torture, inhuman or degrading treatment should necessarily have been suspended and punishment like flogging and amputation should have been introduced. Did the Supreme Court hold the view that all this comes within the doctrine of necessity?

The situation in Pakistan with regard to the Supreme Court and its decision in Begum Nusrat Bhutto's case needs special study by jurists. The Constitution certainly was not kept in abeyance. It was in a permanent state of abeyance. Bhutto more appropriately perhaps described that it was being kept in preservation like Pharaoh's mummy.

The question also arises whether the Supreme Court and the High Court served any longer as a shield to protect the citizens from violations of human and Constitutional rights or did it become an appendage of a military establishment? This question again arises for study. It must be stressed with some emphasis that one need not agree with Bhutto's political philosophies to form the view that Bhutto was not proved guilty at the trial nor need one agree with the political philosophies of General Zia to hold that if Bhutto was unjustly convicted and hanged it was the sole responsibility of the judiciary and the judiciary alone. Whatever the prevailing circumstances General Zia cannot be said to have not left the question of Bhutto's guilt to the judicial conscience of the judges. As mentioned earlier, the three judges of the Supreme Court who acquitted Bhutto in appeal did not deal with the question of bias and the political motives as they were not willing to accept the prosecution case against Bhutto but it is a matter for serious consideration how the four judges who dismissed his appeal sweepingly came to three

conclusions without any reservations, viz. (1) There was no bias and a denial of substantial justice to Bhutto in the High Court; (2) The political considerations were irrelevant in the case; (3) The evidence of Masood Mahmood was acceptable and his evidence was amply corroborated. Their judgement with great respect lacked analysis and examination before they arrived at their conclusions in the judgement of the Chief Justice. It is most unfortunate that in the lengthy judgement of the Chief Justice with which the other 3 judges agreed, these 3 issues were dealt with rather summarily in the following manner:-

(1) “In the light of the declared law and the facts discussed above, I have reached the conclusion that although some of the orders made by the trial Bench in the day to day conduct of the case may not have been correct on a strict view of the law, and some others may not have been called for in the facts and circumstances of the case, yet these were all matters within the discretion of the Court and mere error therein cannot amount to prove bias” (Para 915 of Chief Justice’s judgement).

In other words, although some of the orders may not have been correct on a strict view of the law and some other orders may not have been called for, the Court had a discretion to make such orders which were not correct on a strict view of the law and to make such orders that may not have been called for in the facts and circumstances of the case. This is rather an astoundingly puzzling proposition and it is certainly a disturbing thought if it becomes a judicial philosophy especially in a criminal trial. The Chief Justice expunged 7 paragraphs of the judgement of the High Court which he said were gratuitous observations regarding the accused such as “a Muslim only in name”, “a consummate liar”, “the arch culprit” who had “abused his powers under the Constitution for satisfying his personal inane craving for self aggrandizement and perpetuation of his rule”, when these questions were not issues in the case. The language used, the orders made and the judicial behavior in all the instances if not singly, collectively reveal the attitude of the Bench and it is not so easy to dismiss them as not proof of bias.

(2) The Chief Justice on the question of political considerations refused to treat them as relevant. He observed “the fate of the present appeal must depend not on the motive of those who re-opened the investigation of the case on the promulgation of Martial Law on the 5th of July 1977, but on the strength or weakness of the evidence adduced in support of the allegation made by Ahamed Raza Kasuri in the First Information Report made by him as long ago as the 11th of November 1974 minutes after his father had breathed his last owing to injuries sustained during the attack on the complainant’s car. If the requisite evidence satisfying the legal and judicial standards applicable in criminal trials of the present kind is available on the record to prove the guilt of the appellant, then the duty of the Court is clear irrespective of political considerations which might have led to the overthrow of the appellant’s Government in July 1977 and the re-opening of the present case thereafter. The converse is equally true. If sufficient evidence is not available to sustain the convictions recorded against the appellant, they must be set aside regardless of any political consideration (para 32). The fallacies in the last three sentences have already been dealt with at pages 98-99. If political considerations are alleged as motive not only for the charge preferred against the appellant but on the question of witnesses falsely

implicating him either out of fear or out of a desire to obtain a pardon by pleasing the investigators to catch their prize quarry on the eve of a general election, these considerations should have been examined in testing for instance the testimony of Masood Mahmood. They cannot be kept away from the judicial minds. It is not a question of supporting any political philosophy but a question of applying an additional relevant test to examine the credibility of a witness. Moreover it is a misdirection to equate the converse with the motive and credibility test. If there is insufficient evidence to support the conviction that is the end of the matter. On the other hand when there is sufficient evidence political considerations must have been treated as relevant on the questions before the judges. Why was Bhutto implicated by Masood Mahmood? Was Bhutto's conviction of relevance to the investigators and Masood Mahmood? Could the investigators have been chasing after Bhutto before the elections if they were to be held? Why was Masood Mahmood given a pardon when the force which was under his management was so hopelessly involved in the crime when he was the Director General of the force harassing politicians while being an adept according to Welch at fabricating false cases. The Chief Justice had, with great respect misdirected himself when he held that political considerations were irrelevant and closed his mind and did not apply the political test to evaluate the case of the prosecution. In many cases political considerations are human considerations which determine human behavior on the part of investigators and witnesses in a subjective sense and they have nothing to do with the relative merits of political philosophies and the conduct of the Martial Law Administration. The investigations were not done by General Zia, the accused was not tried by General Zia and the appeal was not heard by General Zia. But the investigation, the prosecution and the trial were human exercises through human agencies prone to be influenced by human factors. It was unrealistic in the special circumstances of this case to dismiss political considerations as irrelevant.

The Chief Justice misdirected himself further when he stated that the fate of the present appeal must depend not on the motive of those who re-opened the case after the promulgation of Martial law but on the strength or weakness of the evidence adduced in support of the allegation made by Kasuri on the 11th of November 1974, minutes after his father breathed his last. In the first place Kasuri's statement on the 11th of November 1974 was not an allegation against Bhutto that he was the killer. He related the undisputed incident in Parliament on the 3rd of June 1974 and the political motivation which quite unjustly was blown up as a murderous threat extended to Kasuri on the floor of the House. The words certainly were not a threat to kill. Kasuri's evidence at the trial and his efforts to meet Bhutto along with his unsuccessful application seeking nomination thereafter to contest the March elections of 1977 on the PPP ticket whittles down and shrinks this blow up of the incident which was never in dispute. On the other hand it was Masood Mahmood alone who on his own was giving directions to Welch to eliminate the anti - State elements especially Kasuri at the time of the Cafe China Speech of Kasuri which attacked the Federal Security Force and the Government. Was the complaint of Kasuri of the 11th November 1974 really an allegation against Bhutto in so many words after all? Moreover how could the Judges close their minds to political and human behavior and test the strength or weakness of the witnesses? Could the Judges have turned a Nelsonian eye to the political realities influencing human conduct altogether?

(3) The Chief Justice having thus held that political circumstances were irrelevant arrived at the conclusion the “In the circumstances I am fully satisfied that the High Court was right in placing reliance upon the testimony of approver Masood Mahmood corroborated as it by the mass of evidence discussed in the preceding paragraphs — This evidence fully implicates the appellant Zulfikar Ali Bhutto and Mian Abbas in this crime besides of course the approver himself” (para 660). This finding with regard to Bhutto has been arrived at after many misdirections and nondirections in the judgement of the Chief Justice, e.g. the discounting of political considerations as irrelevant, the failure to give due weight to the wrong orders of the High Court, the mis-directions on the law and the misapplication of the law to the facts of the case with regard to motive, corroboration and circumstantial evidence, the erroneous finding with regard to Kasuri’ s subsequent anxiety to seek an audience with Bhutto and PPP nomination for the election, the erroneous finding with regard to the endorsements in PW3/16/D, the failure to examine the evidence of Masood Mahmood either as an ordinary witness or as ‘an approver, treatment of the motive to kill Kasuri and the complaint of Kasuri on the 11th November 1974 as the bed rock of the prosecution case and the failure to appreciate the significance of Welch’ s evidence as helpful to the defence. It is not possible to say that the Judges would have arrived at the same finding against Bhutto without the abovementioned misdirections and non-directions. It is also difficult to say that Bhutto was proved guilty at the trial. That does not mean that this view must be accepted without examination. The readers and the people will of course form their own views each his own with whatever assistance given to the reader in this book.

A deeper study of these questions referred to will enrich our jurisprudence and be a guide to judges of the future.

In any case, to the common run of persons, the willingness of the judges to take an oath without allegiance to the Constitution appears strange indeed.

It is hoped that this book will acquaint the public and the people of Pakistan with the salient facts of the case and help them to understand the case that was against Zulfikar Ali Bhutto.

It is most appropriate to conclude this book with a quotation from Hazrat Ali’ s famous epistle written many centuries ago which is good advice to any ruler at any time, “select for your Chief Judge one from the people who is by far the best among them - he who is not obsessed with domestic worries, one who cannot be intimidated, one who does not err too often, one who does not turn back from a right path once he finds it, one who is not self centered or avaricious, one who will riot decide before knowing the full facts, one who will weigh with care every attendant doubt after taking everything into full consideration, one who will not grow restive over the arguments of advocates and who will examine with patience every new disclosure of fact and who will be strictly impartial to his decision, one whom flattery cannot mislead or one who does not exalt over his position. But it is not easy to find such men.... give him a position in your Court so high that neither back biting nor intrigue can touch him”.

EPILOGUE

The epilogue is in the nature of a postscript. It is placed after the author has written his conclusions and the reader also had perhaps reached his conclusions about the case that was against Bhutto.

The following are extracts from two books *i.e.*

A. “If I am Assassinated” with an introduction by Pran Chopra and was published by Vikas publishing House Pvt. Limited (February 1979).

B. “From my Death Cell” containing Bhutto’s four day speech in the Supreme Court. It was Bhutto’s swan song. This book was banned in Pakistan published by Orient Paperbacks with an introduction by Pilloo Mody after Bhutto was hanged in April 1979.

The following extracts are purposefully placed at the end of the book to enable the reader to return his/her verdict on the evidence presented by the prosecution, without considering what Bhutto had to say which he said so eloquently and so forcefully. The author has merely commented on these extracts to explain the topics.

Zulfikar All Bhutto, after his arrest while in detention, during his trial and after, during the hearing of his appeal and thereafter, never gave the impression that he was dispirited and he showed no signs of distress or despair. To quote his own words -

A. Extracts from “*If I am Assassinated*” with comments

In Death Cell

(1) “Since the 18th of March 1978 (*i.e.* the day he was sentenced to death by the High Court) I have spent twenty two to twenty three hours out of the twenty four in a congested and suffocating death cell. I have been, hemmed in by its sordidness and stink throughout the heat and rain of the long hot summer. The light is poor. My eye sight has worsened. My health has been shattered. I have been in solitary confinement for almost an year but my morale is high because I am not made of the wood which burns easily. Through sheer will power, in conditions that are adverse in the extreme, I have written this rejoinder. Let all the White Papers come. I do not have to defend myself at the Bar of public opinion. My services to the cause of our people are a mirror in front of them....”.

White papers

It will be interesting, however, to note that at the time Bhutto was facing a trial in the High Court and while his appeal was pending he had to fight many other battles besides the vilification in the White papers against him and his regime. It was a clear case of

contempt of the Court to vilify an accused person on matters that were relevant to his case.

We find that Bhutto immediately filed the below mentioned document in the Supreme Court.

**(2) In the Supreme Court of Pakistan
Criminal Appellate of Jurisdiction,
Criminal Appeal No. 11 of 1979
Zulfikar Ali Bhutto
Son of Sir Nawaz Bhutto,
District Jail, Rawalpindi**

Appellant

Vs.
The State

Respondent

The undersigned respondent respectfully submits:

1. During the pendency of the present appeal and while it was being heard before this Honourable Court, the Government of Pakistan has come out with two white Papers one on the alleged rigging of elections in March 1977 and the other on the alleged misuse of the news media during the tenure of my Government. Obviously, the time for publishing the false fabricated and malicious allegations contained in the two White Papers has been deliberately chosen and is a calculated attempt to prejudice mankind against me and to prejudice the hearing of my case. The second White Paper on the media which was issued on 28-8-78 was in fact printed on 25-3-78 as would appear from the printing date on the front page and the cover on which another date was superimposed.
2. That I am confined to in a death cell and have no access to the material needed to for effectively refuting the false and scandalous allegations in the White Papers. Nevertheless, with all my limitations, I have attempted to reply to the same in the following paragraphs to keep the record straight and for such action as this Honouable Court deems fit in the interest of justice.

Z.A.Bhutto.

The Rejoinder

The contents of these documents are a rejoinder to the accusations, fearlessly expressed and certainly the accused put the accuser in the dock. It is amazing how Bhutto in the circumstances he was placed was able to marshal the facts to meet the charges, from the Death Cell with a sentence of death hanging over him. It is unfortunate that the Supreme Court did nothing on Bhutto's petition while passively and helplessly allowing such situations in which Bhutto was driven to fence with his opponents both in and out of

court. He did so with consummate skill, courage and eloquence. It was a forceful rejoinder to the barrage of propaganda against him. It was quite obvious that all this vilification whether true or false, wholly false or partly false, accurate or exaggerated was directed to prepare the people to treat Bhutto as a villain. The White Papers were freely distributed in the country and abroad to do damage to Bhutto on the eve of his execution. Bhutto's Counsel on the other hand tried his best to print and publish this rejoinder but it was blacked out in Pakistan. What is relevant to the trial of Bhutto is the references to the issues in the case and the conduct of the proceedings and we shall, confine ourselves to the relevant extracts on these matters. This is what he had to say about open trials:

The Traditions of an Open Trial.

(3) "The history of Europe and Britain is rich and replete in the traditions of an open trial. The Common Law considers an open trial as being an indispensable ingredient of justice. After a gallant struggle, the free people of America made certain that the rights of public trial becomes inviolable by incorporating it as the 6th Amendment to the Constitution. The maxim "justice must not only be done but also must be seen to be done" is an elementary and unimpeachable norm of law. During the murder trial, one judge made the profound observation, 'we are trying you and not the public'. On this illuminating remark the Chief Justice of Lahore High Court added, 'but he wants publicity'. What an irony. As I said at the trial in Lahore, 'forget the fact that I have been the President and Prime Minister of Pakistan. Forget the fact that I am the leader of the premier party of this country and I am facing a murder trial. Even the ordinary citizen... and I consider myself one... is not denied justice'. The sensitivity of the trial Judges on the exposure of their bias was more important for them than my life. If a trial for murder can be held *in camera* there is no need to hold any trial in public...."

Bhutto refers to the refusal by the High Court to allow him to address after he heard the prosecution case summed up by the prosecuting counsel.

Not given the right of reply

(4) "Yet even in that convoluted and closed court, I was not permitted to put forward my defence. Orally I was informed in Kot Lakpat jail that my request to address the court after the prosecution case, was rejected. I was not a practising lawyer. From the 9th of January 1978 I was not being defended by lawyers. I have not heard the prosecution witnesses during my long illness and absence from the court. I had been insulted and humiliated by the court during the open trial for 3 months. The prosecution case had received the full blast of publicity. The trial had been converted into a secret conclave. The dice was completely loaded against me. But with all these harrowing handicaps, when I sought to address the closed court in defence of my life, I was not permitted because I wanted to hear the prosecution before replying as a layman, without legal notes, without the aid of law books and legal rulings. This preeminently reasonable request, this

request for rough and ready justice was turned down.... This is the extent to which I have been made a victim of criminal injustice....”

It was alleged often that Bhutto was guilty of contemptuous and arrogant conduct in the High Court. Bhutto replies:

(f) “It is wrong to state that I did not try to co-operate with the trial Bench. Nothing short of my life was at stake. I had sense enough to extend co-operation and courtesy to those who would tell me that I should hang until I am dead. But the trial Bench wanted me to prostrate myself before it. That is why I had to tell the Bench that I would not crawl and cringe before it. A Muslim can only prostrate himself before his creator. But the Bench, in particular the Chief Justice was always rude, abrasive and insulting to me. In striking contrast, the Chief Justice was kindness itself to the confessing co-accused. He smiled at them. He enjoyed their rustic sense of humor at my expense. He was patient with them in a fatherly fashion. He would translate the questions in Urdu and Punjabi for them whenever he thought that they were unable to follow the English. The taunts, the frowns and shouts were reserved only for me. I was favoured with comments to “shut up”, “get up” and “take this man until he regains his senses”. In these circumstances to talk of cooperation is to ask for the patience of a saint...”

The White Papers

(6) Bhutto makes the following statement with regard to the circumstances and objective in the publication of the White Papers. “This so called White paper which has been thrown on the ground has come in the middle of my appeal against the death sentence. It has been distributed throughout the world. It has been extensively broadcast on the radio and television. Nasty and vicious editorials have appeared on it. Foreign journalists are being requested to publicise it. Ambassadors of Pakistan are holding receptions for the elite of the countries of their accreditation for the distribution of this document. It is a big extravaganza on a worldwide scale... the object is to vitiate the climate of opinion against me so that everyone from the humblest clerk to the mightiest court may be driven to one conclusion. In assessing the purpose and the intention, the objective and the aim, it can safely be said that a more vulgar and spiteful effort could not have been made to harass a leader.....

The Capsule of secrecy

(7) It was Bhutto’ s complaint that what he has to say in defence to the alleged accusation are all put in “a capsule of secrecy” and blacked out. The only opportunity he had to defend himself was to put his case in the documents he filed in the Supreme Court. Those accusations were on his character and his politics presenting him as a villain and even touching on some of the facts adduced at his trial and appeal. It was most unfortunate again that the Supreme Court did not prohibit these publications or censure those responsible for the publication, and merely pigeon holed this document, and thereafter held that political considerations were irrelevant. In this document there is a reference to

A.Z. Faruqi, the Secretary to the Election Commissioner who Bhutto states had tried to generate resentment and hatred against him. The said Faruqi is the nephew of N.A. Faruqi, the brother-in-law of the principal approver, Masood Mahmood. Does this relationship have any significance? The White paper contained a full chapter devoted to an allegation against Yahya Bakhtiar, the senior defence counsel for Bhutto in the hearing of the appeal. Bhutto puts forward a spirited defence for him and states, “On top of these bayonet pricks comes the White paper to single him (Bakhtiar) out as a special case. The aim is to destroy his image, to damage his credibility and character, to belittle him in the eyes of the people and to make judiciary and the Bar hostile towards him, to tell him to forget about Masood Mahmood and Ghulam Hussain and others because “charity begins at home”. The aim is to embarrass him, to rattle him and upset him while he is arguing my appeal. In a single sweep, the falcon wants to carry the client in one talon and his counsel in the other....”.

Doctrine of necessity

(8) With regard to the doctrine of necessity he stated as follows in this document which was submitted to the Supreme Court. The observations below would have certainly embarrassed the judges of the Supreme Court and the Attorney General. “The office of Attorney General during Martial Law is a slap on the face of law. There is no room for an Attorney General in a system without law: The White paper says that the Attorney General is considered to be the custodian of the rule of law. Under Martial Law the Attorney General has to tell the Supreme Court that the Constitution has been abrogated or suspended by his masters, that all laws have been subordinated to Martial Law. He has to say that necessity requires the people of Pakistan to eat pig’s meat. During the necessity of the Second World War, the British people lived on fish and chips but Parliament did not close. London became a rubble with the deafening sounds of the V2. Despite the clash of arms, Lord Atkin had the courage to dissent on the curtailment of Liberty in *Liversidge v. Anderson*. In Pakistan, the Attorney General of the Junta comes to the Supreme Court to plead for the supremacy of a *coup detat* over the Constitution and or the supremacy of the rule of the Generals over the rule of law....”.

In the said document, Bhutto ably and remarkably, forcefully and argumentatively puts his accusers in the dock. It is a valuable document for the historians. It affords many lessons to all third world countries. But most parts of the contents are not too relevant to this book. The above statements in the document were not referred to earlier so that the readers may independent of Bhutto arrive at their own verdict and then as a matter of fact acquaint themselves with the statements of Bhutto.. Likewise, passing on to the speech which Bhutto made in the Supreme Court after the Counsel addressed the court. He spoke for 4 days, for 12 hours altogether at the conclusion of the hearing in the 3rd week of December, 1978.

Here are certain portions of his speech which may be of relevant interest to the readers.

Motive

(1) With regard to the motive evidence, he said this: “If the subordinate police officers were reluctant to mention the name of the Prime Minister in the F.I.R., I would not be aware of it. If today the name of the Chief Martial Law Administrator is mentioned in a murder case, I think the first reaction of the subordinate officers would be to take it easy or to consult his senior officer. After all, no ordinary person is being mentioned..... I am a politician..... I have myself faced virulent attacks since the time I became a member of the National Assembly in 1962. Even in this Assembly, the attacks made on me were far more virulent, far more aggressive. So it cannot be said that I was thin-skinned in politics and coming from a different profession I had trespassed into politics and could not tolerate the flood of bitter criticism. That would happen to a non-politician.... As a matter of fact, I am not even directly implicated in the F.I.R.....

Burden of proof

(2) He contemptuously dealt with the Public prosecutor having talked about high probability in a criminal case. “He had tried to draw quantum of proof from the law of tots..... With regard to the approver’s evidence, Bhutto had this to say. “After all if there is an approver, the approver must first of all be a reliable witness in his own right, and after standing on his own legs he must be corroborated by material evidence, independent evidence and sufficient evidence which is not forthcoming at all in this case.....

Bhutto’s speech was mainly a political speech as he felt he was speaking more to the world and the people. He made full use of that opportunity and perhaps made it impossible for the Martial Law Regime thereafter to show him any sympathy on a question of commutation or mercy.

Political persecution

(3) Bhutto attacked the Martial Law Regime most forcefully and he stated that it was not mercy but justice he wanted. “I do not want pity from anyone and as I said earlier I do not want mercy. I want justice. I am not pleading for my life as such, not as a way of flesh, because everyone has to go. There have been so many attacks on my life. I was attacked at Sanghar. I escaped miraculously in Sadiqabad. Then in the Frontier tribal territories a bomb exploded just before I was to speak. There were at least 4 or 5 attempts in Baluchistan once by a Langah, who threw a hand grenade at me. So it is not life as life that I plead for. I want justice. This is a forged case it is a completely fabricated case... I want my innocence to be established. Not for the person of Zulfikar All Bhutto. I want it established on higher considerations for there has been grotesque injustice. All the crimp and colour of political persecution cannot be found in a more classical case than this....”.

B. Extracts from “From My Death Cell” and comments

1. In his speech in the Appeal Court Bhutto also states this with regard to the incident in Parliament in June 1974 and the complaint made by Kasuri soon after his father’s death in the FIR “as a matter of fact I am not even mentioned in it. I have not been directly implicated. This does not make me an accused. This does not pinpoint me as the murderer of Kasuri’s father. As Mr. Justice Waheedudhin (who fell ill most unfortunately for Bhutto) aptly pointed out, this may be the reason for the motive but it cannot be a motive....”

2. To refer now to a far more significant passage in his speech, “Not that I would like to have any pity. I do not want pity from anyone and as I said earlier I do not want mercy. I want justice. I am not pleading for my life as such, not as a way of flesh because every one has to go. There have been so many attacks on my life.... at Sanghar....in Sadigabad....in the Frontier tribal territories... four or five attempts at Baluchistan.....”

A Fabricated Case

3. “This is a forged case. It is a completely fabricated case all the crimp and colour of a political persecution cannot be found in a more classical case than this....In this connection I would like to speak of the bad treatment meted to me. Only a sick and depraved regime could have treated me like this. They keep on saying that I want to be treated like a Prime Minister; that I still think I am President. I am a very humble man. It is not a question of my wanting to be treated as President or a Prime Minister. I want to suppress that fact because that fact is responsible for the false and fabricated case. I want to forget that I was ever President or Prime Minister because that is the consideration, obsession that lies at the basis, of this case.... I have been called “compulsive liar”. Where did I ever have the opportunity to address (given evidence) in the court, for it to be said I am a compulsive liar?....”

4. “I am not a criminal but yet I am treated like a criminal. I am treated worse than the co-accused. I hear the sound of music, I hear their laughter in the death cell from which I cannot get out. For ninety days I have not seen the sun-shine or the light. On the 15th of October when two prisoners ran away, I was locked up. What did I have to do with their escape? Where was the connection? I have not run away from my country....” Bhutto said he could have run away from his country but he did not.

The Death Cell

On the first day of his speech in the Supreme Court before the adjournment for the day Bhutto stated, “This is the first time I have come out of solitary confinement. I find it hard to adjust to the equilibrium. I can hardly stand”. The Court was adjourned till 9 a.m. the next day. Mr. Yahya Baktiar suggested that the court resume its sittings at 9.30 a.m.

The Chief justice, however, said that 9 a.m. will suit better as Mr. Bhutto was an early riser.

5. This provoked Bhutto to say “Early riser? I am not permitted to even sleep.... Fifty lunatics were kept near my cell for three months. They would shriek and scream all the time and I could hardly sleep. When I came to Rawalpindi first the game was to throw pebbles on my roof. At first I used to think perhaps I was dreaming but then during Ramazan I did not sleep at night. I used to wait for sehri (the meal to break fast) and then I heard the noise on the tin roof at intervals of 15 minutes and I realised that pebbles were being thrown on the roof. When that stopped, a new device was adopted. There is a parapet wall just close to my cell and there is a military guard posted there. So every now and then the guard jumps on the parapet with his boots and that terrible jumping noise like a heavy thud has replaced the pebbles. The noise comes twice and keeps on happening because apparently there is not one guard but several. I thought last night that I would be spared the ordeal as I was to come to court today but it happened all the same. You see, it is because of my spirit and my determination, it is because of my strong will and because I am a leader that I have been able to face this ordeal and have been able to come here. No ordinary man would have been able to come, an ordinary man would have disintegrated long ago. You did not know how haggard I am. I am finished. For twenty five days, there has been no water in the death cell. It was restored only yesterday. But if the Court so wishes, I can come at 9 o’clock or even at 8 o’clock.

The order the Chief Justice made was that Bhutto be permitted to get ready in time. There is a reference to his daughter Benazir Bhutto which may be of some interest to the reader.

Benazir Bhutto

6. “When I became seriously ill it was said that I should have asked the court for treatment. But when I asked for my daughter of whom I am exceptionally fond, for she is a chip of the same block and even if my sons fail me, she will not fail me, I was told that I was not within the jurisdiction of Court, that I was in detention under the Martial Law Regulation No. 12 and that the court had no control over me....”. I should not just be buried in the name on that automatically. Why should I be? Here I cannot be responsible for the lapses or other defects of these people if the case is left untraced. I would like to know how many cases in these eighteen months have been untraced....”.

No vicarious criminal Responsibility

7. “Every crime or wrong is not thrown on the doorstep of the President or the Prime Minister....”. Bhutto’s position was that he as Prime Minister cannot be made an accused for every crime during his regime.

He is not involved

8. “I am not involved. I am not concerned in it as a matter of tact. It was said that Masood Mahmood might have had his own motive for committing the offence. On that remark, the state counsel said half of his case had been proved. Half of your case had been proved against whom? May be against Masood, may be against the confessing co-accused but not against me. I say this because the defence is not obliged to give any counter reasons for motive. That is why I objected yesterday to the question of fabricated evidence in inverted commas in the order passed by the lower court. How can you say ‘fabricated’ in inverted commas when the defence makes an application that it is fabricated? It is for the prosecution to prove beyond reasonable doubt that it is not fabricated...”.

9. “Ahamad Raza Kasuri’ s statement in the FIR is his opinion”.

10. “Masood Mahmood says he meets me almost every day. He says that when I travel to Multan he is with me at Multan, when I travel to Quetta he is with me in Quetta. He is with me wherever I go because he is the FSF, he is everywhere. He says he has access to me. I have the green telephone, I use the green telephone. Why should I introduce this element, this foreign element into what the special public prosecutor, the late Mr. Anwar describes as “a close circuit crime”? If I was to be a criminal, I would not just throw the crime around like that and say “go and remind him that I gave him a message about Ahmad Raza Kasuri....”.

With regard to document 3/16D, Bhutto stated in answer to Court that photostats were kept because it was a party question whether or not Kasuri should join the party and it was not a question covered by the Official Secrets Act....

The document 3/16-D

11. “If I had considered that this document is going to save my life and is going to come to my rescue.... it would not have been in this form and shape, and it would not have been so worded.... crude language is used, harsh language is used.... My endorsement is ‘he must be kept on the rails, he must repent, he must crawl before he meets me. He has been a dirty dog. He has called me a mad man. He has gone to the extent of accusing me of killing his father. He is a lick, he is ungrateful. Let him stew in his juice for some time....’ . It was strictly a party matter..... If I wanted to establish an alibi, if I wanted my life to depend on this one document, I had a guilty mind, certainly I would not be placing solely my defence on this one obscene document which is such that I would have used in that event, very sedate words. This is spontaneous. I would not have called him a licker or a dirty dog... I would have tried to use the best language..... You can see from the spontaneity of the words that there is no question of my trying to rely on this little straw.....”.

Why did the judges reject 3/16D? They had to perhaps on the ground that it was a forgery. If this document is genuine, it gives a lie to Saeed Ahmad’s evidence that Bhutto was trying to get Kasuri back into his fold. This finding is in the teeth of the evidence led and

is an absolute misdirection on the part of the trial judges and the majority judges of the Supreme Court.

Why engage unwilling conspirators?

12. Bhutto said he need not have engaged the services of men who were dragging their feet to murder Kasuri. “Well, I have got men, under my command who will put Mehindi on their hands and Surma in their eyes and say ‘we have done it’ . Why should I go to these people and say ‘ For God’ s sake do this’ - Such a dirty thing and commit this sort of crime. I am not a murderer.....”

Untraced

13. With regard to the first information report and the case being left untraced, Bhutto said this. If this case has not been traced, I should not just be buried in the name on that automatically. Why should I be? Here I cannot be responsible for the lapses or other defects of these people if the case is left untraced. I would like to know how many cases in these eighteen months have been untraced....”.

14. “This is not first case that has been untraced. The first Prime Minister of Pakistan was shot in this city of Rawalpindi no investigation was permitted. Then in the end, feeling the pressure of Parliament someone from Scotland Yard, a Mr. Urene, came for a short while. Mr. Urene gives a report from Scotland Yard saying he received no cooperation. Begum Liaquat Ali Khan was crying hoarse, “What has happened, where is my husband’s FIR (first information report)? Where is my husband’s investigation? But she was packed off as an Ambassador for life. I had many critics Rao Khurshid, Wali Khan and Asghar Khan.... I was not frightened....It did not affect me....”.

The Public Prosecutor At the Trial

When Bhutto commented on the innuendos that have been made against him by the Special Public Prosecutor over the shooting of Sharpao, Asadullah Mangal and Rafiq and when he demonstrated in the appeal how he had no involvement with all this, the C.J. said this was not on record. Bakthiar submitted at this stage that the Special Public Prosecutor was allowed to address on it as the social realities of the day. The C.J. replied anyway the conviction was not based on these facts. If that were so why did he (the C.J. of the High Court) allow the Public Prosecutor to say all this? Bhutto’s position was that there was lot of mud slinging on him in the trial Court.

The Record At the Trial

15. “Justice is higher than the record....the record of the High Court is defective, tampered, tailored and manipulated and boycotted by me. There are great gaps on the record. In the judgement order in the Habeas Corpus application (supposed to be) given on the 5th of November, it has been said, “in view of the Supreme Court judgement” which was on the 10th of November....”

“If you ask me to go by the tight rope of that record alone, then, I would submit that it will be an unnecessary hindrance....”

Motive

16. “Mr. Haleem (the present C.J. of the Pakistan S.C.) observed that motive is the basis of the conspiracy. If motive is abolished, if motive is destroyed, if motive is gone the basis of the conspiracy itself falls....”

17. Kasuri finally proves his point when he is asked, “How have you implicated Mr. Bhutto in the FIR”, he answered, “This is my style.....”

18. “I saw yesterday in an hour that whatever your views, I was being heard. I am not a judge. I cannot judge what is in your mind but objectively I see that you are giving me a patient hearing. Thank God at least I have had a say. After one year I have at least been heard. We are very sentimental people. Now that you have done this favour to me, now that you have conceded my right to speak and be heard, you can hang me. I had no motive to kill this man or to have him killed. My fight is with big people on big issues.....”

Masood Mahmood

19. With regard to Masood Mahmood, Bhutto asked why he should tell him to be on the right side of Vaqar....They were both civil servants and he was after all the Prime Minister. Mahmood said in evidence that he was told by him to break up meetings of the opponents and to swell the crowd at the PPP meetings...what was the necessity to do so when lakhs of people attended these meetings of the PPP? All this was not said in his earlier statements. It is subsequently he said so to fall in line with Kasuri. Bhutto also made a point that there was no need for him to send a message through Saeed Ahmad Khan to Masood Mahmood reminding him of the job he had entrusted to him after asking him whether he knew Kasuri. What was the need, he asked, for him to publicise a conspiracy thus and why should he when Masood Mahmood is constantly in touch with him personally and on the green telephone? He had left out all the material points in his two statements in August to the authorities.

20. “Abdul Haq (his favorite officer) the man who played the role between him and the authorities” was with him along with his stenographer. Why he did leave out the material

points which he alleged against him later? A full and complete statement was not made even when he was pardoned. Were they understandable or belatedly false improvements at the initiation of the Martial Law team of interrogators? Masood Mahmood says he did not know Ghulam Hussain the arch planner and killer. One of the confessing co-accused was his body-guard....he did not know any of them:

“Ghulam Hussain happens to be his favorite. Ghulam Hussain is on duty in the National Assembly. Masood Mahmood says he is present there.... but he knows not any one of them. What did he know? He does not know the plan or the conspiracy. He is just asked to go and remind Mian Abbas. He claimed to be a ‘conscientious man’, a ‘God fearing man’ . This man is the main link in the conspiracy. Bhutto says he is supposed to have lost his temper with him.... it is all fiction. He would never have spoken to Masood Mahmood at 6.30 a.m. in Multan; it has been proved that it just could not have been done at 6.30 a.m. The I.G.P had phoned him at 8.30 a.m. and he was asked to telephone Bhutto as 9.30 a.m. Bhutto ridicules the evidence of Masood Mahmood that he tried to poison his food and threatened his children.

21. “Am I threatening his wife and children while he remains in the FS F as Director General?” Nothing of the kind happened. There are certain opposition leaders who, Masood Mahmood says, threatened to hang him upside down. Does he expect anyone to believe both he and the opposition were trying to harm him and yet nothing happened?

22. “He goes on foreign tours. I give him permission when he wanted to go. He goes on a long tour to the best of countries.... Belgium, France, England and Japan and he takes his wife with him....”. Masood Mahmood warned him about danger to his children and their safety was entrusted to him and yet Bhutto is supposed to be threatening Masood Mahmood’s children....”. He is lying with a capital L, says Bhutto. Seth Abid is related to him. He is married to Masood Mahmood’s sister. It was Seth Abid’s brother who sent meals to him in the camp jail.

23. “For two years the authorities were trying to get hold of this smuggler (Seth Abid) and he disappears from Pakistan. He returns to Pakistan when Martial Law is imposed and he gets a pardon. All his cases are wiped out and his cases go untraced. He becomes clean... he has been exonerated. He is made a respectable citizen. He has got permission to open his bank. His income tax cases have been taken out. But Masood Mahmood does not know all this. Masood Mahmood’s wife is a cousin of Mrs. N.N. Faruqui....and says “I do not know”....what do you know then....you do not know Seth Abid, you do not know anything about the conspiracy. You do not know anything about the plot. You are not involved, you do not know Ghulam Hussain. You do not know anything. You are so innocent.. this is the first time civil servants have been taken into custody immediately when Martial Law was declared. Next time perhaps the Judges might also be taken in who knows.

Masood Mahmood denied about the interrogating martial law team.... he says they are the higher authorities. He makes a hundred page “clean breast to the Chief Martial Law Administrator” written with the assistance of a stenographer....

The Trial contd.

Bhutto proceeded to his trial recounting all the unfortunate and ugly incidents which smeared the name of justice. The trial did not start till the 11th of October as some documents were not available. Already the incident of the 24th of September and the news item in the “Pakistan Times” created a situation. Later on he was not allowed to argue constitutional points. He was put behind a dock that was constructed. He was far away from his Counsel. It was a physical impediment. There were special police officers sitting like two vultures on either side of him. He was not close enough to his Counsel to give instructions....

Sympathy to bereaved family

24. Bhutto stated. “You know, I genuinely expressed my feeling about the death of Mohammad Ahamad Khan.... both my wife and I sent telegrams of condolence to his family when the death occurred...I did not know the whole thing was going to be thrown on me subsequently if a person is harpooned with a false and fabricated case and convicted for a capital punishment, he also has feelings...”

The Secret Trial and the Crisis

24. With regard to the in camera proceedings Bhutto stated, “..... The Chief Justice gave virtually full assurance of the trial being an open trial. He said that I would be tried in the full light of day and according to common law tradition The Chief Justice also expressed the wish that Amnesty International would make an appearance to see how fairly the trial was being conducted. In view of this press conference, I would like to know from whence the secret trial. After all, I heard the prosecution for two and a half or three months. For two and a half or three months I sat in silence and when my time came, when my opportunity for defence came, why then at that point of time was the trial arbitrarily converted into a secret trial....by taking this action, the Court was the gainer, but the Court was a loser by trying to shut a man who utters the words that a crisis of jurisprudence will be created if he is to be prosecuted, should be tried *in camera*. So now at this final stage a new reason has been attached for holding the trial *in camera*.... it is on record that the Chief Justice became a complainant against me. You know sometimes words are spoken in a lighter vein and moreover when it was suggested that I was supposed to have wanted Mr. Justice Rizvi to be bumped off and the words “Chief Justice” was used instead of ‘ Justice’ , it was the Chief Justice who said in reference to his own self “the time of the Chief Justice has not come yet” It was very pleasant to see him with a smile on his face for the first time, so I also said in jest “yours will come too”....when I said in a pure jovial spirit “your time will come too”. The time of all Muslims comes “he flew with a rage and told the S.P. on duty to file a complaint against me....”.

Bias

26. Bhutto had this to say about the treatment of the prosecution case and the defence. “When there has been talk of evidence, it has always been the evidence of the prosecution whether or not the prosecution proved its case, the word fabricated used by me in reference to this case was put in inverted commas.... to put the word fabricated in inverted commas is an exposure if not a betrayal of the mind of the Trial Court”

27. In connection with his illness Bhutto stated “In view of my illness an adjournment of 2 days was granted. But I needed some time to recover

Trial Proceeds despite absence

Given my serious condition two days constituted hardly any adjournment. Then it was said by the Court that as a matter of grace one more day would be granted. But I needed some time to recover. One more day was not sufficient. Although not only my personal doctors but even the jail doctors and the Superintendent said that I was not well enough to attend Court, the case proceeded without me and 15 important witnesses including Welch, Asgher Khan and Vakil Khan were examined and cross-examined in my absence. When one is sick it is all the more difficult to give instructions so these witnesses can be said to have examined not only in my absence but also in the absence of instructions from me....”.

Remand Jail

28. About the condition in remand Bhutto stated, “moreover, I was locked up in a room which was hardly conducive to recovery. There was open ventilation and it being winter, I was exposed to the cold and the wind which aggravated my condition further. My temperature rose to 102-103 and I was really in a bad shape....

Bias

But what happened when I attended the Court on the 6th and on the 7th (December and in winter)? The Court passed the order that henceforth we would sit from 8 o'clock in the morning till 4.30 in the evening every day including Thursday and the case would proceed on that basis.... it took almost an hour from Kot Lokpat to the High Court which meant getting up at 6 in the morning and returning to Kot Lokpat Jail at 5.30 in the evening after a tedious day without even a lunch break. What instructions could I possibly be expected to give in those circumstances especially since I had been ill for 3 weeks?...”

Bhutto also stated to the Supreme Court that when he wanted to see his wife and daughter, the Chief Justice of the High Court said “You are not in our jurisdiction”. But when at the

same time the Court wanted to cause him inconvenience and embarrass him gave orders to the DS P of Kot Lokpat jail.... He referred to all the insults heaped on him by the Court.... so much so that at one stage he did thump the table not realising that it would be construed as contempt of Court and said to the Court, “You are here to dispense justice. You are here to pass a judgement. You can pass any judgement you like but why do you want to insult me? Is it also a part of the Penal Code or Criminal Procedure Code that when you want to convict a man for murder then you must persistently insult him all along the Trial?....”

Secret proceedings

29. “Court reopened on the 9th of January and when I was coming out of the room in which I was made to sit before going to the Court, I was informed that I was wanted inside the chambers. Understandably taken aback, I went in and saw all the 5 Judges sitting there. They made a Court of the chambers. The C.J. told S. P. Zafrullah who accompanied me to sit down. There was another chair, so I also sat down. He immediately shouted at me to get up and said, “You are an accused, you are not supposed to sit down”: So I was an accused and not supposed to sit down. I stood up. Then I was asked if the application was mine and if I had signed it. I replied in the affirmative. Then I was told to argue it. The application was an earnest appeal for a transfer.... I had never seen a Court sitting in chambers.... I was called alone into chambers.... then my lawyers were called and given a hearing of hardly five or ten minutes... When I wanted to supplement certain points, I was told, “You are a strange person. Sometimes you say you want lawyers and sometimes you say you want to talk yourself, make up your mind”. I asked the Justice where the contradiction lay? I had earlier said that my lawyers should be permitted to argue the legal points and I would like to make some supplementary observations. At this the C.J. reported, “You know this is not Mochi gate”. I wished it was Mochi gate but it was not. It was the chamber of the High Court.... Why was this application not heard in open Court.... Why had it to be a secret chamber trial?.... Now I come to January 24th (1978) when I was to answer questions under section 342. In the very beginning when I began my submission, I said, I would not speak on those aspects of the case which had a direct bearing or were relatable to my defence, my main interest being bias and mala fides. At this I was given assurance by the C.J. in open Court that I would have all the time to speak on those subjects when the final question, “Why this case against you?” was posed. On that assumption, on that basis, I proceeded to answer in a limited form....”.

Boycott of Proceedings

30. When a Judge in appeal asked the pertinent question what he had in mind is not answering the other questions, Bhutto replied, “You see as far as I was concerned, I had boycotted the main trial as from January 1978. I had to go to the High Court a., I was not a free agent. Well, on the 25th of January I find that I was taken to an empty Court and a secret trial. I was absolutely at sea, I was bewildered. No order had been made, no order had been shown, no notice had been given. I was not aware of my rights. I was not aware

if this was legal or not. A totally different impression had been conveyed to me on the 24th. On coming to Court on the 25th, I found myself in an entirely new situation....

“The point is I wanted to consult my lawyers on the legality of a secret trial.... To my amazement, I found that it was secret only in terms of what I had to say. Everything that was said by the confessing accused during the course of the trial which continued to be held in camera right up to the end was not only reported but was given publicity on the television and radio. The trial was secret only as far as it concerned my person, secret to the extent that I should not even to be given the order of the 25th of January of which I learned only through the ‘Pakistan Times’ report that a subsequent order had been passed....

“The order of the 24th stated that the trial will be held in camera because I was going to make scurrilous allegations against the Court....

Bias

“You see, I wanted to bring out objective facts about bias.... Why should it have been assumed that I was going to scandalize the Court?.... This order does not justify the legality of the secret trial. This was pointed out to Court and so on the 25th a subsequent order was passed which seemed to have been brought in line with what I had said about secret trials according to common law and the order stated that disturbances were feared in Court. I say, the High Court of Lahore is a fortress. Some of you live in Lahore. You must have seen. It was a barricaded place, the roads were barricaded, the whole place was swamped with policemen, women police and army officers. It was not even possible for the advocates to gain access to the Court. How could it have been possible for anyone to create disturbances?.... This was mentioned in the order of the 25th to meet one of the conditions cited by me as being a prerequisite for a secret trial according to Halisbury. Thus we see that the order of the 24th was not based on correct facts..... even the press was blocked out.... I was asked to answer question 54, I replied that I was still on the question of the illegality of this trial which had become null and void long ago and was now completely illegal. At this Mr. Justice Aftab, said to me, “What has your speech got to do with the question that I have put to you? You answer my question.... So I just smiled and continued to speak (n the illegality of the trial.... On the 7th of February, I was compelled to say that there were many gaps and lacunae in the record.... and it did not reproduce what I had said....

“I do not want to tire this Court but taking into account the Court’s insistence to give all the benefits of the doubts to the prosecution, taking into account my illness and the treatment meted, is there one aspect, one element of this whole trial from its inception to its end and even after.... where prejudice of the Bench has not been shown?.... Here I would like to mention the C.J.’s personal insistence that I should be immediately taken to the Death Cell... So I was dragged to the death cell”

The Death Cell

31. Describing the conditions in and around his death cell which the authorities did not allow Amnesty International to visit, Bhutto stated, “The Fort was full of soldiers. They were hovering all over the place, even in the corridor. The corridor was full of refuse. One could hardly stand there. Then there were six cells - the death cell, a bathroom and 4 other cells. Those four cells were fly-proof, the death cell was completely exposed not even a fly-proof. It was summer. It was hot, my whole face was full of flies and mosquitoes. The room of the guards had fly-proofs. I am glad about that. I could at least have been given one too. I have still not got it. Then, the bathroom was completely open and I was expected to go there with people marching up and down all the time until this Court came to my rescue. I just refused to eat not that it was hunger strike as such, it was just that in those circumstances, I simply could not eat. Then this Court intervened and some facilities were accorded. A chik was put up for the bathroom and a switch was put inside my room to regulate the light which used to be on all the time. I could hardly come in to the corridor as I would be told to go in as my time was up. So I decided not to come out at all. After all my self respect was more important. I could not submit myself to every indignity, neither did I want to keep on complaining but in June, (1978) I fell ill and General Shaukat, an Army General, not a PPP man, was sent to see me. He had tears in his eyes when he saw me. The room was full of dust. The springs of the bed were jutting out. My back was examined; it was in a terrible state and had scars on it. When he went the bed was changed. And so the maltreatment continued. In contrast, the confessing co-accused have been given all the privileges and all the facilities”.

“They are next door, so I can hear them. Families come and go. I can hear the sound of music, laughter. As far as I am concerned, even the ordinary facilities are denied to me. You know a great deal has been constantly said about nobody being above the law. I do not want to be above the law. But I want my legal rights. I want to be under the law but I don’t want to be underground the law”.

The Co-accused in the Supreme Court

With regard to what the co-accused will say when they were given the opportunity to speak after him, Bhutto had something hard to say. These accused excluding Mian Abbas had all confessed to the crime. Their counsel had taken a very attractive defence and made their legal submission on the ground that (1) they were by mistake of fact made to think that they were bound by law to carry out the order to kill Kasuri. (2) They carried out that order under grave and imminent threat to their lives. (Vide chapter V)

So that they had a fair hearing and their submissions were reserved for consideration. As far as Mian Abbas was concerned, his defence hitherto had been that he was absolutely innocent, and that the prosecution evidence against him was false and fabricated. In appeal, however, he submitted a written application doing a complete U turn and accepting the whole prosecution case and taking up the same defence as the rest of the accused. Bhutto made these observations on the role of co-accused at this juncture in the

hearing of the appeal. “Yes, yes, I know and I will tell you why they have been brought here. They have had their full say in the High Court and all that they said have been published. (They had never implicated Bhutto personally so far). Because this court had given me permission to speak here, they have been brought here to neutralise me. I will tell the court exactly what they are going to say. ‘The FSF was a terror force, they were helpless, they were not free agents’. You will hear a diatribe on the FSF, a diatribe on me and, of course, they will plead for mercy. One of them (Mian Abbas) has sent to this court a petition from jail that since he is going to his God that he would like to make a clean breast of things. If he is going to his God, then why ask this court for mercy for his life? If he is going to God Almighty, why does he want to fall at the feet of the court and want mercy from the court, he wants his life to be spared by taking the life of an innocent man?”

Bhutto finally concluded his speech, **“I am certain you will uphold the Majesty of the law and never turn into matrons of Martial Law....”**.

Although the Bhutto Trial is the most notable trial of the century, It is a trial about which the less is known.

It is not in the interests of justice for some to say that Bhutto was guilty and for others to say that he was innocent, without knowing the facts of the case. There are some who even say that whether Bhutto is guilty or not, he should never have been hanged. This is most unfair to Bhutto. Never during the appeal or thereafter did Bhutto ask for mercy. In fact, he had strictly instructed his lawyers and the members of his family that no such application should be made. The purpose of this book is to assist the people to answer that one question. “Was Bhutto proved guilty at the Trial?” and the next question” Was there a fair trial without bias?”

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