

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD

CASE NO. : CRIMINAL APPEAL NO.01-2019

Mian Muhammad Nawaz Sharif

Vs.

State through Chairman, National Accountability Bureau, Islamabad

Appellant by : Kh. Haris Ahmed, Sr. ASC, Mr. Munawwar Iqbal Duggal, ASC, Mr. Sher Afghan, ASC, Mr. Zubair Khalid, ASC, Mr. Ibrahim Haroon, AHC, Mr. Arshad Jadoon, Mr. Atta Ullah Tarar, Advocate and Mr. M. Faisal Irfan, Advocate

Respondents by : Mr. Jahanzeb Khan Bharwana, Additional Prosecutor General NAB, Mr. Imran ul Haq Khan, Deputy Prosecutor General NAB, Sardar Muzaffar Abbasi, Deputy Prosecutor General NAB, Mr. Naeem Tariq Sanghera, Special Prosecutor, Syed Jalal Hussain, Special Prosecutor, NAB.
 Mr. Tariq Mahmood Khokhar, Additional Attorney General, Mr. Arshad Mehmood Kayani, Deputy Attorney General, Mr. Saqlain Haider Awan, Mr. Muhammad Nadeem Khan Khakwani and Mr. Farrukh Shehzad Dall, Assistant Attorney General

Date of decision : 15.09.2020

Crl. Misc. NOS.213 & 229-2020

AAMER FAROOQ J. These are applications under section 561-A Cr.P.C., alongwith other provisions, filed by the appellant.

2. On the last date of hearing i.e. 10.09.2020, it was brought to the attention of the Court that the appellant has been declared a 'proclaimed offender' in another Reference filed before Accountability Court No.III, Islamabad and the learned Additional Prosecutor General, NAB argued that since this is the position, applications filed by the appellant cannot proceed further. Learned counsel for the appellant had sought an adjournment for addressing arguments on this issue as well as his right of audience.

3. Learned counsel for the appellant/applicant submitted that the fact that appellant has been declared a proclaimed offender in other proceedings does not preclude his right of audience in the instant

matter in light of decision of this Court reported as ‘Inam ur Rahiem Vs. Chairman, National Accountability Bureau, Islamabad and another’ (PLD 2018 Islamabad 251). It was contended that exceptional circumstances exist in the instant matter, as the appellant is indisposed and as per the medical certificates appended with the application, he is unable to travel. It was further contended that in light of decision of Hon’ble Lahore High Court reported as ‘Muhammad Nawazish Ali Vs. Election Commission of Pakistan’ (2018 CLC 1301), an absconder retains his fundamental rights and can agitate proceedings in the matters other than in which he has been declared a proclaimed offender. Reliance was also placed on cases reported as ‘Gokuee S. Arora Vs. Govt. of Pakistan’ (2018 PTD 1856), Lahore High Court Bar Association and others Vs. General (Retd.) Pervez Musharraf and others’ (2019 SCMR 1029, ‘Malik Shama-ud-Din Vs. Muhammad Fayyaz and 2-others’ (2002 SCMR 1293) and ‘Ikram Ullah and others Vs. The State’ (2015 SCMR 1002). Learned counsel pointed out that if a person is fugitive from law, he does not lose all his rights and in this behalf, the main judgment on the issue is ‘Hayat Bakhsh and others Vs. The State’ (PLD 1981 Supreme Court 265). Reliance was also placed on cases reported as ‘Chan Shah Vs. The Crown’ (PLD 1956 FC 43) and ‘Muhammad Aslam Vs. State’ (1972 SCMR 194). Learned counsel took the Court through reminders and contended that the fact that a person has been declared a proclaimed offender, that does not absolutely debar his appeal being heard on merits. It was contended that there is no judgment squarely on the issue in hand but there is case law on either side that appeal can be heard on merits or otherwise, however, learned counsel pointed out that most of the case law by august

Apex Court pertains to the appeals being heard by the Hon'ble Supreme Court of Pakistan; under the Supreme Court Rules and Orders and not under the general law. Learned counsel read through various pronouncements on the issue, in particular, case reported as 'Hayat Bakhsh and others Vs. The State' (PLD 1981 Supreme Court 265) to highlight that where the matter is pending before High Court, the same is to be decided in accordance with prevalent law. When enquired, as to on what grounds, instant applications have been filed, learned counsel took the Court through the certificates appended with the application by one Dr. David Lawrence to the effect that appellant has various indispositions and his surgery could not take place due to which, his medical condition got deteriorated and he cannot travel. Learned counsel further submitted that under section 423 Cr.P.C., the appeal can be proceeded and decided on merits.

4. Responding to the arguments by learned counsel for the appellant, Mr. Jahanzeb Khan Bharwana, Additional Prosecutor General NAB reiterated his stance that instant applications are not maintainable, as in essence, Crl.Misc. No.229-2020 seeks review of order dated 10.09.2020 and Crl.Misc. No.213-2020 seeks perpetual exemption from appearance. He also highlighted that instant applications are under section 561-A Cr.P.C. which provision is barred under section 9-B of National Accountability Bureau Ordinance, 1999. He further placed reliance on order dated 01.04.2019 passed by the Hon'ble Supreme Court of Pakistan in Civil Review Petition No.513 of 2014 as well as case reported as 'Ikram Ullah and others Vs. The State' (2015 SCMR 1002), 'Karam Ellahi Vs.

The State and 2-others' (2013 P.Cr.LJ 1727) and 'Syed Zeeshan Hussain Kazmi Vs. The State and 3-others' (2000 P.Cr.LJ 645).

5. Arguments advanced by learned counsel for the parties have been heard and the documents, placed on record, examined with their able assistance.

6. In Crl.Misc.No.229-2020, the appellant has made the following prayer:-

"It is, therefore, most respectfully prayed that in the peculiar facts and circumstances as detailed hereinabove, this Hon'ble Court may very graciously forgo the requirement of the applicant's surrender at this stage, and to proceed with the matter as prayed for in his CM No.213-2020".

7. In Crl.Misc.No.213-2020, the appellant has made the following prayer:-

"It is, therefore, prayed most respectfully that this Hon'ble Court may very graciously either adjourn the titled Appeal or the appeal filed by him may very graciously be heard and decided on the basis of the record and pending applications after hearing the Pleader already appointed by him and appearing before this Hon'ble Court in terms of section 423 Code of Criminal Procedure, 1898"

8. The background, leading to filing of instant applications, is that appellant filed Crl. App. No.01-2019 challenging his conviction and sentence awarded to the appellant vide judgment dated 24.12.2018 in Reference No.19-2017 passed by Accountability Court-II, Islamabad. The appeal was admitted for regular hearing. The appellant also filed a petition under Article 199 of the Constitution (W.P. No.3716 of 2019) titled 'Mian Muhammad Shahbaz Sharif and another Vs. The State through Chairman NAB, Islamabad etc. seeking suspension of sentence and release on bail. This Court, vide judgment dated 29.10.2019, suspended sentence of appellant handed down by Accountability Court-II, Islamabad vide judgment dated 24.12.2018 in Reference No.19-2017 and granted bail to him

for a period of eight weeks. It was observed that in case indisposition of the appellant continues, he may apply for extension in suspension of sentence before Government of Punjab under section 401 (2) Cr.P.C. The appellant applied to the Government of Punjab for extension in suspension of sentence but on 27.02.2020, the Government of Punjab did not extend the suspension of sentence of the appellant and as such, suspension and bail of the appellant lapsed. Meanwhile on the application of the appellant, Federal Government removed his name from Exit Control List subject to certain conditions. The said conditions were challenged before Hon'ble Lahore High Court, Lahore and same were modified and the matter is still pending there. The appellant proceeded to United Kingdom in November, 2019.

9. Admittedly, suspension of sentence of appellant and bail granted by this Court lapsed and even Government of Punjab refused to extend suspension of his sentence and since 27.02.2020, the appellant is not on bail.

10. The thrust of the arguments by learned counsel for the appellant was that under section 423 Cr.P.C. the appellant can still be heard and his appeal decided on merits. We defer the matter regarding decision of appeal on merits for the time being, as we feel that at this juncture, it is of paramount importance that since appellant is not before the Court, as he ought to have been after lapse of bail, to procure his attendance. In this regard, vide order dated 01.09.2020, this Court had ordered the appellant to appear before the Court and surrender to the authorities before the next date of hearing which he did not do so and filed Crl.Misc.No.229-2020. Earlier, the appellant filed Crl.Misc.No.213-2020, on which,

notice was issued to respondents on 01.09.2020. Meanwhile, appellant has also been declared a proclaimed offender in NAB Reference No.6 of 2020 vide order dated 09.09.2020 passed by Accountability Court No.III, Islamabad.

11. It is an admitted position that fugitive from law has no rights before the court of law except where exceptional circumstances exist. This Court in case reported as 'Inam ur Rahiem Vs. Chairman, National Accountability Bureau, Islamabad and another' (PLD 2018 Islamabad 251) did not afford opportunity of hearing to learned counsel appearing on behalf of General (R) Pervaiz Musharraf due to the fact that he was fugitive from law. For sake of brevity, relevant portion is reproduced below: -

“4. A learned counsel who had appeared on behalf of General (Retd.) Pervaiz Musharraf requested that he may be given audience. However, he was informed that neither could his power of attorney be entertained nor could he be heard because General (Rtd.) Pervaiz Musharraf has been declared a proclaimed offender by the competent courts of Pakistan. It is settled law that a person who is a fugitive from the law and who does not surrender to the process of justice is neither entitled to any relief, nor on a power of attorney executed by him in favour of a counsel be accepted, except under exceptional circumstances. Reliance is placed on Hayat Bakhsh and others Vs. The State PLD 1981 SC 265, Chan Shah Vs. The Crown PLD 1856 FC 43 Mohtarma Benazir Bhutto, MNA Leader of the Opposition, Bilawal House, Karachi V.s The State Chief Ehtesab Commission 1999 SCMR 1519 AND The State through National Accountability Bureau, Islamabad Vs. Haji Nasim ur Rehman PLD 2005 SC 270.

Similarly, the position was reiterated by Larger Bench of this Court in decision dated 27.11.2019 in case titled 'The Ministry of Interior, Government of Pakistan through its Secretary Vs. The Special Court through its Registrar' (W.P. No.4075-2019).

12. The Hon'ble Supreme Court in Civil Review Petition No.513 of 2014 did hear arguments by learned counsel appearing for General

(R) Pervaiz Musharraf but in para-6 of the order dated 01.09.2014, did observe that accused being a proclaimed offender loses his right of audience and forfeits his right to put up a defence.

13. The rights of a person fugitive from law or an absconder have been dealt in great detail by the Hon'ble Supreme Court of Pakistan in judgment reported as 'Hayat Bakhsh and others Vs. The State' (PLD 1981 Supreme Court 265) and even certain clarifications were handed down. Reliance was placed on cases reported as 'Chan Shah Vs. The Crown' (PLD 1956 FC 43) as well as 'Muhammad Aslam Vs. State' (1972 SCMR 194) and it was categorically observed that said cases need no review. The Hon'ble Supreme Court of Pakistan also observed that fugitive from law does not enjoy any right and the inherent jurisdiction of the Court is not to be invoked in his aid as otherwise, same would amount to acting against administration of justice. In the same judgment, the Hon'ble Supreme Court of Pakistan also observed that it is the duty of the advocate/counsel appearing on behalf of convict /absconder to ensure his presence before the Court unless he is unable to do so for reasons beyond his control; that the absconder be granted opportunities to appear before the court. The Hon'ble Supreme Court of Pakistan also discussed the rights of absconder, if any, in case reported as 'The State through National Accountability Bureau Islamabad Vs. Haji Nasim ur Rehman' (PLD 2005 Supreme Court 270). In case reported as 'Shah Zarin Vs. Gul Zamin and another' (2014 YLR 1310), the Hon'ble Peshawar High Court observed that judicial discretion could not be exercised in favour of a person who is fugitive from law particularly when proceedings under sections 204 & 87 Cr.P.C. had been carried out against him. Similarly, in case reported as 'Syed

Zeeshan Hussain Kazmi Vs. The State and 3-others' (2000 P.Cr.LJ 645), it was observed that where accused is fugitive from law, he loses his normal rights granted by the procedural or substantive law and the inherent jurisdiction vested in the Court under section 561-A Cr.P.C. could not be exercised in favour of an absconder.

14. In view of above case law and especially relying upon case reported as 'Hayat Bakhsh and others Vs. The State' (PLD 1981 Supreme Court 265), which still is the leading judgment on the issue of absconder or fugitive from law and is a judgment of 5-Members Bench of Hon'ble Supreme Court of Pakistan, we believe that yet another opportunity is to be granted to the appellant to appear before the Court. The appellant is not entitled to invoke inherent jurisdiction and request recalling of order dated 01.09.2020 on the basis of his indisposition when especially on the repeated queries on 01.09.2020 and 10.09.2020, learned counsel for the appellant contended that appellant is not hospitalized. The appellant's suspension of sentence ended on 27.02.2020 and he did not challenge said order passed by Government of Punjab nor did he approach this Court for further extension in suspension of sentence; the appellant remained silent for almost six months till such time that instant appeals were fixed. The conduct of the appellant, in the facts and circumstances, does not warrant any exercise of discretion in his favour.

15. The fact that proceedings governing the appellant's exit from Pakistan pending before Hon'ble Lahore High Court, Lahore has no bearing on the instant proceedings.

16. For what has been stated above, the applications filed by the appellant are misconceived. In so far as request of appellant for

decision of case on merits is concerned, the referred issue shall be decided in accordance with section 423 Cr.P.C. as well as case law on the subject after the process for procuring attendance of appellant is completed. In so far as recalling of order dated 01.09.2020 is concerned regarding asking the appellant to appear in person, the same plea is not tenable. It is reiterated that at this juncture, only order is being passed and opportunity is being afforded to the applicant to appear before the Court. The decision regarding deciding the appeal on merit shall be taken at later stage.

17. In view of foregoing, CM No.213-2020 is disposed of in light of above observations and CM No.229-2020 is dismissed.

Main Appeal

18. Let non-bailable warrants of arrest of the appellant be issued for 22.09.2020. The warrants of arrest shall be executed by the Foreign Office through High Commission of Pakistan in United Kingdom.

19. Relist on 22.09.2020.

(MOHSIN AKHTAR KAYANI)
JUDGE

(AAMER FAROOQ)
JUDGE

Zawar