

Form No.HCJD/C-121
IN THE LAHORE HIGH COURT, MULTAN BENCH,
MULTAN.
(JUDICIAL DEPARTMENT)

Criminal Appeal No.55/2013

Muhammad Iqbal, etc. vs. The State and another

S/No. of order/Proceedings	Date of order/Proceedings	Order with signature of Judge, and that of parties or counsel, where necessary.
	06.09.2023.	Rana Muhammad Nadim Kanju, Advocate for the Petitioners. Mr. Muhammad Abdul Wadood, Additional Prosecutor General & Mr. Muhammad Ali Shahab, Deputy Prosecutor General.

Crl.Misc.No.3200-M/2023.

Through this petition under section 426 (2B) Cr.P.C. petitioners seek suspension of sentences i.e., *imprisonment for life and compensation on two counts under section 302(b) read with section 34, PPC and rigorous imprisonment for ten years with fine under section 324 read with section 34, PPC*; as altered by this Court vide judgment dated 09.05.2018 passed in Murder Reference No.27 of 2013 and the appeals filed against the judgment dated 22.01.2013 passed by learned Additional Sessions Judge, Dunyanpur, District Lodhran in a private complaint titled “Ghulam Farooq vs. Muhammad Iqbal, etc.” arising out of case FIR No.295/2010 dated 26.07.2010 under sections 302, 324, 148/149, 109 PPC registered at Police Station City Dunyapur, District Lodhran.

2. The learned counsel for the petitioners submits that petition for leave to appeal filed against the judgment of this Court dated 09.05.2018 passed in Murder Reference No.27/2013 and the connected matters, was fixed before the Supreme Court of Pakistan on 03.03.2023, wherein leave has been granted, therefore, pursuant to section 426 (2B) Cr.P.C., the sentences of the petitioners may be suspended and they be released on bail. On the other hand learned Prosecutors opposed the exercise of jurisdiction by this Court under above section on the ground that petitioners were not on bail during

hearing of their appeals and section 426 (2B) Cr.P.C. is meant for a situation when High Court grants a ‘special leave to appeal’ to the Supreme Court and not at the time when ‘leave to appeal’ is granted by the Supreme Court because such Court has powers to stay the execution of any sentence, pending the petition or appeal, under Supreme Court Rules, 1980. Divergent pleas and stances of proponents required us to probe and see the nature of sub-Section (2B) of 426 Cr.P.C.

3. Heard, record perused: In order to view sub-section (2B) of section 426 Cr.P.C in its entirety, some relevant material including Acts, Constitutional provisions, rules and precedents were essential which were collected with the help of Mr. Muhammad Jaffar, Additional Prosecutor General and Mr. Ijaz Hussain, Civil Judge, working in research center at Multan Bench. Their effort for providing requisite assistance is highly appreciated.

4. It evinces that sub-section (2B) was inserted in section 426 Cr.P.C. for grant of bail to an accused in a situation when High Court has convicted him or maintained his sentence and a special leave to appeal to Supreme Court is granted against said conviction. Considering the stance of learned prosecutors, a question arises as to whether remedy in the form of “special leave to appeal” is availed from a High Court for filing appeal to the Supreme Court or it is directly granted by the Supreme Court and what connotes ‘special leave to appeal’ when it has not been defined anywhere in law. This is the core point of our discussion in this case, because Constitution of the Islamic Republic of Pakistan, 1973 and Supreme Court Rules, 1980 talk about ‘leave to appeal’ and not ‘special leave to appeal’. We were also concerned about the situation that when after decision, no lis remains pending with High Court and it becomes functus officio, then how it can grant bail to the accused whom leave to appeal is granted by the Supreme Court in such case. In order to find the true spirit of this sub-section, we went into recitation of relevant law, Constitutional provisions, Rules and

precedents, and while doing this exercise we were also thoughtful as to whether any other like provision is available in prevalent law, we however, found a response while tracking and reading section 382A Cr.P.C. which authorizes the trial court to suspend the sentence of accused and allow him to remain on bail even after conviction except in two situations for enabling the convict to file appeal against his conviction and sentence. Section is reproduced;

382-A. Postponement of execution of sentences of imprisonment under Section 476 or for a period of less than one year: Notwithstanding anything contained in Section 383 or 391, where the accused—

- (a) is awarded any sentence of imprisonment under Section 476, or
- (b) is sentenced in cases other than those provided for in Section 381, to imprisonment whether with or without fine or whipping, for a period of less than one year.

the sentence shall not, if the accused furnishes bail to the satisfaction of the Court for his appearance at such time and place as the Court may direct, be executed, until the expiry of the period prescribed for making an appeal against such sentence, or if an appeal is made within that time, until the sentence of imprisonment is confirmed by the Appellate Court, but the sentence shall be executed as soon as practicable after the expiry of the period prescribed for making an appeal.

or in case of an appeal, as soon as practicable after the receipt of the order of the Appellate Court confirming the sentence.

The above is an enabling provision for accused to file appeal against conviction while on bail, and whether sub-section (2B) of section 426 Cr.P.C. also maintains the like status that when High Court after conviction grants to the convict special leave to appeal to the Supreme Court, it has also power to suspend his sentence enabling him to file such appeal, or it is entirely a different provision, giving a special jurisdiction to High Court to suspend sentence of an accused whom Supreme Court has granted leave to appeal; therefore, we feel it appropriate to track the legislative history of this provision, and the situation prevailed before and after insertion of sub-section (2B) in section 426 Cr.P.C.

5. Government of India Act, 1915 by virtue of section 113 authorized His Majesty to establish High Court of Judicature in any

territory in British India through letters patent; for better understanding Section is reproduced;

“His Majesty may, if he sees fit, by letters patent, establish a high court of judicature in any territory in British India, whether or not included within the limits of the local jurisdiction of another high court, and confer on any high court so established any such jurisdiction, powers and authority as are vested in or may be conferred on any high court existing at the commencement of this Act and, where a high court is so established in any area included within the limits of the local jurisdiction of another high court, His Majesty may, by letters patent, alter those limits, and make such incidental, consequential and supplemental provisions as may appear to be necessary by reason of the alteration”. **(emphasis supplied)**

Therefore, under said Act, through letters patent dated 21st March, 1919, His Majesty Constituted the High Court of Judicature at Lahore for the Province of the Punjab and Delhi. As per clause-31 of such letters patent, right of appeal from any judgment, order or sentence of High Court in criminal cases was granted which is as follows;

31. And We do further ordain that from any judgment, order or sentence of the High Court of Judicature at Lahore, made in the exercise of original criminal jurisdiction or in any criminal case where any point or points of law have been reserved for the opinion of the said High Court, in manner provided by the 18th clause of these presents by any Court which has exercised original jurisdiction, order or sentence to appeal Us, Our heirs or successors, in Council, provided the said High Court declares that the case is a fit one for such appeal, and that the appeal be made under such conditions as the said High Court may establish or require, but subject always to such rules and orders as are now in force, or may from time to time be made, respecting appeals to Ourselves in Council from the Courts of the Provinces of the Punjab and Delhi.

This was a special right of appeal to His Majesty in Council against any judgment, order or sentence of the High Court, (1) made in the exercise of original criminal jurisdiction or (2) in any criminal case and that too with special leave of High Court in a particular situation when the High Court reserves any point or points of law and declares a case fit for appeal, and not in every case as a matter of course.

6. Later through Government of India Act, 1935, Federal Court was constituted and pursuant to section 205, a right of appeal to Federal Court was given against any judgment, decree or final order

of a High Court that too in the like terms as mentioned in clause-31 of the letters patent cited above i.e., issuance of certificate by the High Court that the case involves a substantial question of law as to the interpretation of this Act or any Order in Council made thereunder; Section 205 runs as under;

205.- (1) An appeal shall lie to the Federal Court from any judgment, decree or final order of a High Court in British India, if the High Court certifies that the case involves a substantial question of law as to the interpretation of this Act or any Order in Council made thereunder, and it shall be the duty of every High Court in British India to consider in every case whether or not any such question is involved and of its own motion to give or to withhold a certificate accordingly.

(2) Where such a certificate is given, any party in the case may appeal to the Federal Court on the ground that any such question as aforesaid has been wrongly decided, and on any ground on which that party could have appealed without special leave to His Majesty in Council if no such certificate had been given, and, with the leave of the Federal Court, on any other ground, and **no direct appeal shall lie to His Majesty in Council, either with or without special leave.**

Though there was a finality to the judgment of High Court except in a situation when High Court grants leave to appeal to His Majesty in Council, but with the establishment of Federal Court, by virtue of above section a conditional right of appeal was provided against any judgment, decree or final order of High Court so as to curtail direct litigation to His Majesty in Council. However, it did not disturb the arrangement/remedy in place under clause-31 of letters patent, which is reflected from sub-section (2) of Section 205 above. As per clause-31 of letters patent, appeal before His majesty in Council was competent in following situation;

- i. against any judgment, order or sentence of high court passed in exercise of original criminal jurisdiction;
- ii. in any criminal case where any point or points of law have been reserved for the opinion of the said High Court.

provided the High Court declares that the case is a fit one for such appeal, and that the appeal be made under such conditions as the High Court may establish or require.

Whereas appeal before the Federal Court u/s 205 above was competent against any judgment, decree or **final order** of a High Court if the High Court certifies that the case involves a substantial question of law **as to the interpretation of this Act or any Order in Council made thereunder.** The section indicates that it was enacted primarily

for right of appeal in civil matters as reflected from the words used, like “judgment, decree or final order” and was conditional to the involvement of a substantial question of law as to the interpretation of the Government of India Act, 1935 or any Order in Council made thereunder, but criminal matters if involve such questions and order too is final in nature, then any such judgment, order or sentence could also be assailed before the Federal Court. Whereas under clause-31 of letters patent, any question of law, other than one related to interpretation of Act of 1935 or any order in Council made thereunder, could be made basis for a direct appeal before His Majesty in council if permission is granted by the High Court; that is the reason sub-section (1) of section 205 above says that it is the duty of High Court to consider in every case whether or not any such question is involved and of its own motion to give or to withhold a certificate accordingly. Likewise sub-section (2) of Section 205 above makes it clear that if any such certificate is given by the High Court, any party can appeal to Federal Court in following situations;

- i. that any such question as aforesaid has been wrongly decided;
- ii. on any ground on which that party could have appealed without special leave to His Majesty in Council if no such certificate had been given;
- iii. with the leave of the Federal Court, on any other ground;

Finally, it was made clear in said sub-section (2) of section 205 that no direct appeal shall lie to His Majesty in Council, **either with or without special leave**; which saves the right of party to approach His Majesty in Council with the permission of High Court under clause-31 of letters patent, without routing to Federal Court, against any judgment, order or sentence of the High Court made in the exercise of original criminal jurisdiction or in any criminal case where any point or points of law have been reserved for the opinion of the said High Court and High Court declares that the case is a fit one for such appeal, and that the appeal be made under such conditions as the said High Court may establish or require.

Through said Act pursuant to Section 206 it was authorized that The Federal Legislature may by Act provide that in **such civil cases** as may be specified in the Act an appeal shall lie to the Federal Court from a judgment decree or final order of a High Court in British India without any such certificate as mentioned in section 205. This section however says that no appeal shall lie under any such Act unless following situations are met;

- (a) the amount or value of the subject matter of the dispute in the court of first instance and still in dispute on appeal was and is not less than fifty thousand rupees or such other sum not less than fifteen thousand rupees as may be specified by the Act, or the judgment decree or final order involves directly or indirectly some claim or question respecting property of the like amount or value; or
- (b) the Federal Court gives special leave to appeal.

The above section authorizes for regulation of right of appeal and ‘special leave to appeal’ in civil cases and that too if it is granted through an Act of Federal Legislature.

7. Section 208 of said Act states that an appeal may be brought to His Majesty in Council from a decision of the Federal Court passed in its original jurisdiction in situations enumerated therein and in any other matter with the leave of Federal Court or His Majesty in Council and section 209 (3) of said Act says as under;

- (3) The Federal Court may, subject to such terms or conditions as it may think fit to impose, order a stay of execution in any case under appeal to the Court, pending the hearing of the appeal, and execution shall be stayed accordingly.

The combined effect of above sections shows that Federal Court too had jurisdiction to stay the execution of sentence and right of appeal to Federal Court or His Majesty in Council was not a matter of course rather special circumstances when any point or points of law are reserved by High Court and declares the case fit to appeal; or any substantial question of law, relating to interpretation of any section of Government of India Act, 1935 or order passed by His Majesty in Council, is involved, therefore, when it was expedient for High Court to grant special leave to appeal under Clause-31 of the letters patent or to give a certificate under section 205 of the

Government of India Act, 1935, it did not have power to suspend the sentence of accused, who was in confinement, enabling him to prefer such appeal.

8. This was felt in a case reported as "Lala Jairam Das and others v. Emperor" [AIR (32) 1945 Privy Council 94] when Lord Russell of Killowen held that under section 426 or 561 of Cr.P.C. High Court has no power to grant bail to an accused who has been granted special leave to appeal to His majesty in Council or to Federal Court and it could only be done through legislation. Legislature duly responded when sub-section (2B) was inserted in section 426 Cr.P.C. through following Act;

The Code of Criminal Procedure (Second Amendment) Act, 1946 (Act No. IV of 1946).

(2B) Where a High Court is satisfied that a convicted person has been granted special leave to appeal to His Majesty in Council against any sentence which it has imposed or maintained, or has been granted leave to appeal to His Majesty in Council against an order of the Federal Court on an appeal from the High Court involving the imposition or maintenance of a sentence it may if it so thinks fit order that pending the appeal the sentence or order appealed against be suspended, and also, if the said person is in confinement, that he be released on bail.

(Underlined for emphasis)

Through above provision, High Court was authorized to suspend the sentence in two situations; like when "special leave to appeal" is granted to His Majesty in Council against any sentence the High Court has imposed or maintained and "leave to appeal" to His Majesty in Council against an order of Federal Court. This difference between "special leave to appeal" and "leave to appeal" can well be comprehended from the situation that 'special leave to appeal' was usually granted by the High Court when any point or points of law are reserved as mentioned in Clause-31 of letters patent, or through issuance of certificate under section 205 of Government of India Act, 1935; whereas leave to appeal was simply granted in suitable cases by Federal Court or His Majesty in Council u/s 208 of Government of India Act, 1935.

Such arrangement one can well imagine from the situation that Court of His Majesty in Council was at a distance of 6000 miles from the jurisdiction of High Court and there was only one Federal Court for whole of India. Thus, keeping in view the means of transportation and access of litigants to the concerned forums, it was a time taking and cumbersome exercise; therefore, this beneficial provision was enacted primarily to save those convicts who were languishing in the jail under petty sentences, lest they should not serve out their entire sentence in the meantime.

9. After the advent of Pakistan in 1947, Government of India Act, 1935 was adopted as the Constitution of the Country through The Pakistan (Provisional Constitutional) Order, 1947; which provides for the establishment of the Federal Court. It was established under the Federal Court of Pakistan Order, 1948 at Karachi; therefore, Rules of Federal Court already in place were also adapted. Power of Federal Court to frame rules was enacted through The Federal Court Act, 1937 (Act XXV of 1937). After 1937, another Act XXI of 1941 was passed with the title “The Federal Court Act, 1941” to empower the Federal Court to make rules with the approval of Governor-General for *“regulating the presentation and prosecution of appeals lying to that Court, including rules relating to the furnishing of security for costs, the proceedings, if any, to be had in High Courts in connection with such appeals, and the preparation and transmission to the Federal Court of the records of such appeals”*; and for that purpose to repeal those provisions of the Code of Civil Procedure, 1908 which now regulate that matter. By virtue of said Act, section 111A of the Code of Civil Procedure, 1908 and Rule 17 of Order 45 of the First Schedule to the said Code was omitted which was primarily inserted through Government of India (Adaptation of Indian Laws) Order, 1937 whereby making the procedure of Privy Council appeals applicable to Federal Court Appeals, but the procedure was cumbersome and dilatory being meant for appeals to a Court 6000 miles away.

10. Similarly, Federal Court (Supplemental Powers) Act, 1942 (Act No. XXVI of 1942) was promulgated to give legal cover to rules for the delegation of certain powers of the Court to the Registrar as mentioned in order VIII Rule 1 of Federal Court Rules because doubts have been raised about the validity of this rule. Section 128 (2) (i), C.P.C. which gives such powers of delegation to the High Courts was not applicable to the Federal Court. It was doubtful whether section 214, Government of India Act, 1935 covers the delegation of powers of the Court to one of its officials. Through said Act, Federal Court was authorized to delegate to the Registrar of the Court or any other official of the Court, by name or generally by designation, any judicial, quasi-judicial and non-judicial duties and the Registrar or such official in the discharge of any such delegated duties shall have power to administer oath.

11. Federal Court of Pakistan was established through the Federal Court of Pakistan Order, 1948 issued by the Governor General in exercise of the powers conferred by section 9 of the Indian Independence Act, 1947 and of all other powers enabling him in that behalf. Through this Order it was ordained that Federal Court shall be deemed to have been established as from the appointed day (15th August, 1947) in accordance with the provisions contained in that behalf in the Government of India Act, 1935 as adapted by the Pakistan through (Provisional Constitutional) Order, 1947. The Rules of the Federal Court in force immediately before the appointed day were declared to be Rules of the Federal Court of Pakistan till such time the other rules are made by the Federal Court of Pakistan. By the time, Act 1 of 1950 titled as Federal Court Enlargement of Jurisdiction Act, 1949 was promulgated to provide for the enlargement of appellate jurisdiction of Federal Court in **civil cases**. Later Federal Court of Pakistan, in pursuance of the powers conferred on it by section 214 of the Government of India Act, 1935 and section 3 of the Federal Court Act, 1941 and all other powers enabling in that behalf, with

the approval of Governor General, made the Federal Court Rules, 1950.

12. Procedure for filing of appeals before Federal Court speaks through Order XII of Federal Court Rules, 1950 which says that next eight succeeding Orders in this part shall apply only to appeals brought to the Court under section 205 of the Government of India Act, 1935 unless they are applicable to other appeals. Next Orders of such Rules spilt into civil and criminal appeals with miscellaneous matters. Order XIX relates to criminal appeals and **there was no concept of leave to appeal in criminal matters** rather it was limited to civil matters only. On what matter criminal appeal lies, Rule-1 of said Order speaks as under;

Where a High Court makes any final order in exercise of its criminal jurisdiction, whether original, appellate or revisional, and gives a certificate as is mentioned in section 205 of the Act, any party to the case may appeal to the Court within thirty days from the date of the order.

Similarly Rule-7 of said Order talks about the stay of execution of any order in following terms;

“Pending the disposal of any appeal under these Rules, the Court may order that the execution of the sentence or order appealed against be stayed or that the accused may be enlarged on bail on such terms as the Court may think fit.”

There was no concept of granting leave to appeal in criminal matters by the Federal Court under above Rules, and while pending appeal Federal Court was competent to stay the execution of sentence. Thus, there remained clarity that applicability of sub-section (2B) of section 426 Cr.P.C. was confined to the situation when special leave to appeal to the Federal Court is granted by the High Court in accordance with section 205 of the Government of India Act, 1935, and clause-31 of letters patent was parametria to it.

13. Through Act XXVI of 1951 titled “Federal Laws (Revisions and Adaptation) Act, 1951” as per second schedule of the Act, amendment was introduced in sub-section (2B) of section 426 Cr.P.C. and following text in sub-section was repealed:

“or has been granted leave to appeal to His Majesty in Council against an order of the Federal Court on an appeal from the High Court involving the imposition or maintenance of a sentence”

Similarly, as per third schedule of above Act, for the words “**His Majesty in Council**” where they first occur, the words “**the Federal Court**” were substituted; and final version of sub-section after amendment was as under;

(2-B) Where a High Court is satisfied that a convicted person has been granted special leave to appeal to the Federal Court against any sentence which it has imposed or maintained, it may, if it so thinks fit order that pending the appeal the sentence or order appealed against be suspended and, also, if the said parson is in confinement, that he be released on bail.

This amendment clearly brought Federal Court in the place of His Majesty in Council, and clause-31 of letters patent which was confined for right of appeal to His Majesty in Council was now to be read for remedy of appeal before Federal Court with the conditions enumerated therein.

14. In year 1956, first Constitution of Pakistan was promulgated; ‘Federal Court’ was redesignated as ‘Supreme Court’ and its jurisdiction in terms of original, appellate, review and advisory were defined. Article 157 of said Constitution counts the appellate jurisdiction of Supreme Court in matters involving interpretation of the Constitution; Article 157 (1) says as under:-

“An appeal shall lie to the Supreme Court from any decree or final order of High Court in civil, criminal or other proceedings, if the High Court certifies that the case involves a substantial question of law as to interpretation of Constitution.”

It was like special leave to appeal as earlier available under section 205 of the Government of India Act, 1935. Article 157(2) of the Constitution also authorized the Supreme Court to grant special leave to appeal on the contours as mentioned in Article 157 (1) when the High Court refuses to give such certificate. Article 159 finds mentioned appellate jurisdiction of Supreme Court in **criminal matters** and paragraph (c) provides right of appeal if High Court certifies that the case is fit one for appeal to the Supreme Court. This provision does not say anything about involvement of any substantial question of law as to the

interpretation of the Constitution; therefore, it was partly like clause-31 of letters patent which says permission/leave to appeal can even be accorded by the High Court in a case where any point or points of law are reserved.

15. Since the promulgation of Government of India Act, 1915 and later instruments like letters patent, Government of India Act, 1935, Rules of Federal Court and Article 157(2) of the Constitution of Pakistan, 1956, special leave to appeal was limited for its routing from High Court to the vertical level like Federal Court or His Majesty in Council but for the first time through the Constitution of Pakistan, 1956 the nature of “special leave to appeal” was explained as follows: -

Article 160. Appeal to the Supreme Court by special leave of the Court.

“Notwithstanding anything in this part, the Supreme Court may grant special leave to appeal from any judgment, decree, order or sentence of any court or tribunal in Pakistan, other than a court or tribunal constituted by or under any law relating to the armed forces.”

It shows that Supreme Court could directly grant special leave to appeal from any judgment, decree, order or sentence of any court or tribunal.

16. Through the Constitution of Pakistan, 1956, Federal Court though stood redesignated as Supreme Court but the words “Federal Court” remained part of Section 426 (2B) Cr.P.C. therefore, this sub-section remained redundant from year 1956 to 1961 until it was again amended through President’s Order No.1 of 1961; Central Laws (Adaptation) Order, 1961 whereby “Federal Court” was replaced by “Supreme Court”. Similarly, for authorizing Supreme Court to make rules, The Federal Court Act, 1937 (Act No. XXV OF 1937), was later amended by A.O., 1961, (Art. 2 and Schedule)., and “Federal Court” was substituted by “Supreme Court” in following terms: -

2. Power of [Supreme Court] to make rules. The [Supreme Court] may make rules for regulating the service of processes issued by the

Court, including rules requiring a High Court from which an appeal has been preferred to [Supreme Court] to serve any process issued by the [Supreme Court] in connection with that appeal.

This amendment was given effect from the 23rd March, 1956.

17. In year 1956, Supreme Court Rules were made pursuant to constitutional mandate under new Constitution whereby Article 160 of the Constitution had introduced the remedy through “Special Leave to appeal” therefore, for the first time for criminal matters Order XXIV in the Rules was kept in place for procedure in filing petitions and applications for “special leave to appeal” before the Supreme Court. Supreme Court Rules 1956 were also amended in the terms that the Supreme Court was granted following power as per Rule 5-B of Order XXIV;

“Pending the disposal of a petition under this Order the Court may direct that execution of any order for imprisonment or fine against which leave to appeal is sought, be stayed, on such terms as the Court may think fit;

Provided that unless surrender is first made to an order of imprisonment as above, the petition shall not be posted for hearing, nor shall operation of such order be stayed.”

Proviso with respect to surrender of accused is indicative of fact that if the accused is on bail by the order of High Court under sub-section (2B) of section 426 Cr.P.C. he must appear before the Court otherwise execution of sentence shall not be stayed. Similar course is adopted when any accused convicted by learned trial court is allowed bail for filing appeal to the next forum as per section 382A Cr.P.C.

18. By the promulgation of Constitution of Pakistan, 1962, the appellate jurisdiction of Supreme Court was redefined as mentioned in Article 58 as under: -

- (1) Subject to this Article, the Supreme Court shall have jurisdiction to hear and determine appeals from judgments, decrees, orders or sentences of a High Court.
- (2) An Appeal to the Supreme Court from a judgment, decree, order or sentence of a High Court shall lie as of right where—
 - (a) the High Court certifies that the case involves a substantial question of law as to the interpretation of this Constitution:

- (b) the High Court has sentenced a person to death or for transportation of life: or
 - (c) the High Court has imposed punishment on a person in pursuance of powers conferred on the Court by Article 123.
- (3) An appeal to the Supreme Court from a judgment, decree, order or sentence of a High Court in a case to which clause (2) of this Article does not apply shall lie only if the Supreme Court grants leave to appeal.

Article 157 (2) & Article 160 of the Constitution of Pakistan, 1956 were dropped relating to “special leave to appeal” rather as per Article 58 (3) of the Constitution of Pakistan, 1962 a conditional right of appeal was granted if the Supreme Court grants “leave to appeal”. This change in Constitution with respect to “special leave to appeal” into “leave to appeal” leaves an impression that framers of Constitution realized that right of “special leave to appeal” was already being regulated in terms mentioned in Article 157 (1) and 159 of the Constitution of Pakistan, 1956 like in a situation when High Court certifies that the case involves a substantial question of law as to interpretation of the Constitution or case is fit one for appeal to the Supreme Court; therefore, Article 160 was superfluous. The merger of Articles 157 & 159 of Constitution of Pakistan, 1956, transformed into Article 58 in new Constitution of Pakistan, 1962. Though remedy through “Special leave to appeal” under the Constitution of Pakistan, 1962 was omitted but Supreme Court Rules, 1956 kept this remedy alive which shows that ‘special leave to appeal’ would only be confined to a situation when High Court through certificate declares that case is fit to be assailed before Supreme Court if it involves a substantial question of law as to the interpretation of the Constitution, which is further fortified by the Supreme Court Rules, 1956 which remained operative despite promulgation of new Constitution of Pakistan, 1962 and body of these rules wherever necessary was later amended in year 1964 & 1965.

19. Order XXIV of said Rules refers to “special leave to appeal” in criminal cases; it is reproduced as under: -

ORDER XXIV

PETITIONS FOR SPECIAL LEAVE TO APPEAL IN CRIMINAL PROCEEDINGS

1. Saved as hereinafter provided the provisions with respect to petitions for special leave to appeal in civil proceedings contained in Order XIII of this Part of the Rules, shall, with necessary modifications and adaptations apply to applications one for special leave to appeal in criminal matters:

Provided that no court-fee, or process-fee or search fee shall be charged and no copying charges shall be made except for copies other than the first to any party to the proceedings.

2. All petitions and applications for special leave to appeal in criminal matters shall be lodged in the Court within thirty days from the date of the judgment or order sought to be appealed or from the date of the refusal of certificate under Article 58(2) (a) of the Constitution by the High Court:

Provided that the Court may for sufficient cause shown extend the time.

“Exception: The period of limitation for a petition for special leave to appeal instituted by the Advocate-General, of a Province against an order of acquittal by the High Court shall be sixty days.”

Sub Rule-2 above which refers Article 58 of the Constitution of Pakistan, 1962 can well be understood that it clearly speaks about “special leave to appeal” and “not leave to appeal” which could have been mentioned because by the time, the words “leave to appeal” have been introduced through Constitution of Pakistan, 1962 as per Article 58 (3) cited in preceding paragraph. Of course, there is a difference between remedy by way of “special leave to appeal” and “leave to appeal” because both remedies were differently mentioned in Clause-31 of letters patent as cited in paragraph-5 above and also in Government of India Act, 1935 if sections 205 to 209 are read in conjunction.

20. A remedy for “special leave to appeal” is not an omnibus remedy rather true meanings of special leave are “leave granted on special grounds” and issuance of certificate for fitness to appeal on special grounds is one mode of the grant of special leave to appeal; therefore, when High Court in a criminal case permits to appeal to the Supreme Court from the sentence of High Court on special

grounds, the High Court may, in its discretion, suspend the sentence and grant bail pending the appeal. However, if “special leave to appeal” and “leave to appeal” be considered as having no difference as referred in case reported as “*TALIB HUSSAIN Versus The STATE and others*” (**PLD 2014 Lahore 574**), then Supreme Court while pending petition for leave to appeal and after granting leave to appeal has like power under Supreme Court Rules to suspend the execution of any sentence which in turn excludes the application of sub-section (2B) of section 426 Cr.P.C. in such proceedings. Thus, applicability of such sub-section kept confined to the extent of ‘special leave to appeal’ granted by the High Court through a fitness certificate, that is the reason, it is still on the statute book and legislature has not swapped the words “special leave to appeal” with the words “leave to appeal” in sub-section (2B) of 426 Cr.P.C.

21. This situation continues even after promulgation of the Constitution of the Islamic Republic of Pakistan, 1973 wherein Article 185(3) also identifies the words “leave to appeal” and Order XXIII of Supreme Court Rules, 1980, relating to petition for leave to appeal, does contain the power to stay the execution of any order for imprisonment etc., as per rule-8 of said Order. However, through Law Reforms Ordinance, 1972, a forum of appeal before a Division Bench of High Court was provided against the conviction and sentence passed by the High Court in its original criminal jurisdiction, which earlier was His Majesty in Council as per clause-31 of the letters patent. For reference section 411A Cr.P.C. is reproduced;

411-A. Appeal from sentence of High Court: (1) Except in cases in which an appeal lies to the Supreme Court under Article 185 of the Constitution any person convicted on a trial held by a High Court in the exercise of its original criminal jurisdiction may, notwithstanding anything contained in Section 418 or Section 423, sub-section (2), or in the Letters Patent of any High Court, appeal to the High Court-

(a) against the conviction on any ground of appeal which involves a matter of law only;

(b) with the leave of the Appellate Court or upon the certificate of the Judge who tried case that it is a fit case for appeal, against the conviction on any ground of appeal which involves a matter of fact

only, or a matter of mixed law and fact, or any other ground which appears to the Appellate Court to be a sufficient ground of appeal; and

(c) with the leave of the Appellate Court, against the sentence passed unless the sentence is, one fixed by law.

(2) Notwithstanding anything contained in Section 417, the Provincial Government may direct the Public Prosecutor to present an appeal to the High Court from any order of acquittal passed by the High Court in the exercise of its original criminal jurisdiction, and such appeal may notwithstanding anything contained in Section 418, or Section 423, subsection (2), or in the Letters Patent of any High Court, but subject to the restrictions imposed by clause (b) and clause (c) of sub-section (1) of this section on an appeal against a conviction, lie on a matter of fact as well as a matter of law.

(3) Notwithstanding anything elsewhere contained in any Act or Regulation an appeal under this section shall be heard by a Division Court of the High Court composed of not less than two Judges, being Judges other than the Judge or Judges by whom the original trial was held; and if the constitution of such a Division Court impracticable, the High Court shall report the circumstances to the Provincial Government which shall take action with a view to the transfer of the appeal under Section 527 to another' High Court.

(4) Subject to such rules as may from time to time tie made by the Supreme Court in this behalf, and to such conditions as the High Court may establish or require, an appeal shall lie to the Supreme Court from any order made on appeal under sub-section (1) by a Division Court of the High Court in respect of which order the High Court declares that The matter is a fit one of such appeal.

With the insertion of this section, appeal against sentence passed by High Court in exercise of original criminal jurisdiction was directed to be filed before Division Bench of High Court, if it involves a question of law, or with the leave of Bench which held the trial, upon the fitness certificate for appeal, or against a sentence not fixed by law, and in this way clause-31 of letters patent has become partly redundant. Whereas for section 205 of Government of India Act, 1935, the corresponding provision is available in the form of Article 185 (2) (f) of the Constitution of the Islamic republic of Pakistan, 1973, i.e., special right of appeal with certificate that case involves a substantial question of law as to the interpretation of the Constitution.

22. It is apparent that in the present scheme of law, sub-section (2B) of 426 Cr.P.C. shall remain applicable only when the High Court certifies that case involves a substantial question of law as to interpretation of the Constitution and a person earns a right of appeal to the Supreme Court which of course is a "special leave to

appeal” as mentioned in sub-section (2B) of section 426 Cr.P.C. On the contrary if the High court refuses to issue such certificate, the leave to appeal (not special leave to appeal) shall be available to the aggrieved as mentioned in rule-2 of Order XXIII of Supreme Court Rules 1980, which is reproduced;

2. A Petition for leave to appeal in criminal matter shall be lodged within thirty days from the date of judgment or final order sought to be appealed from, or as the case may be, from the date of the order refusing certificate under sub-clause (f) of clause (2) of Article 185 of the Constitution: (emphasis supplied)

23. More or less similar view was expressed by Allahabad High Court in case reported as “*Gore Lal and Others. vs State*” **AIR 1958 All 667**; equivalent citation **1958 Cri. LJ 1107**. which is as under: -

“In other words, the High Court has no statutory or inherent power to grant bail to, or suspend the execution of the sentence of, a person whose conviction and sentence it has maintained, except where that person has been granted special leave to appeal under Article 136 of the Constitution, and in no other case. Indeed, except for the purpose of granting a certificate under Article 132(1) or Article 134(1)(c) of the Constitution, or granting bail or suspending the sentence under Section 426 (2B) of the Code, the High Court becomes functus officio. Attention might be drawn to the fact that any other view would result, as pointed out in Jairam Das case (A), in defeating the ends of justice in certain circumstances and in an alteration by the High Court of its judgment contrary to Section 369 of the Code.”

Above view was further fortified when while exhaustively dealing with the issue by High Court of Andhra Pradesh in a case reported as “*Madan Lal Versus The State*” (**AIR 1960 AP 622**), it had ruled that applicability of sub-section (2B) of section 426 Cr.P.C. is conditional to grant of fitness certificate by the High Court for appeal to Supreme Court.

The confusion was finally eliminated when later in Indian Code of Criminal Procedure, 1973, in the corresponding section 389 parametria to section 426 Cr.P.C., provision like sub-section (2B) was omitted.

23. The above discussion leaves no further confusion that sub-section (2B) of section 426 Cr.P.C. is parametria to section 382A Cr.P.C. which is further reflected from the enacted sequence of sub-sections 2, 2A & 2B in section 426 Cr.P.C.; all sub-sections are of

same kind dealing with different situations in which accused seeks bail enabling him to present appeal against the impugned judgment of conviction. If it was a different provision for vesting a special jurisdiction on High Court, then it could have been numbered differently within the section 426 Cr.P.C. which is usually required in the format of an enactment pursuant to legislative drafting technique which is mentioned in "LEGISLATIVE DRAFTING MANUAL HANDBOOK FOR PARLIAMENTARY LEGISLATIVE DRAFTERS January 2019" issued by Pakistan Institute for Parliamentary Services, explanation is as follows;

(35) While amending an Act, certain provisions are to be substituted, added, inserted or omitted, but the words "inserted" and "added" are often confused while giving the command in an amending Bill. The golden rule is that if something is sandwiched in the same genre then it would be inserted and if genre is not same then added. For instance, if one more sub-section is added after the last sub-section then it would be added because after last sub-section, new section starts hence the genre changes. **(emphasis supplied)**

For sub-section (2B) in section 426 Cr.P.C., the amending Act titled "The Code of Criminal Procedure (Second Amendment) Act, 1946 (Act No. IV of 1946)" used the word "inserted" and not "added". The guidance is also sought from a Book titled "Drafting Matters: Guidance" of Scottish Government, available at <https://www.gov.scot:drafting-matters>. Its Part-1 relating to drafting technique says as under;

"to adding a provision at the end of an existing series of provisions of the same kind (for example, a subsection at the end of a section or a schedule at the end of the schedules) the numbering should continue in sequence from the last existing number." **(emphasis supplied)**

That is the reason, legislature for showing sub-section (2B) as provision of same kind inserted it after sub-section 2A in section 426 Cr.P.C.

24. Through section 205 of Government of India Act, 1935, when the High Court certifies to file an appeal before the Federal Court which of course was a special leave to appeal to the Federal Court and when by virtue of section 209(3) of said Act, Federal Court was authorized to stay execution of any sentence on filing an appeal

from the judgment of the High Court, therefore, there was no necessity to insert sub-section (2B) in section 426 Cr.P.C. because purpose was already being served. This provision was, therefore, introduced in year 1946 for those convicts whom special leave to appeal to His Majesty in Council was granted by the High Court and it is learnt that Court of His Majesty in council was 6000 miles away, therefore, it was expected that by the time appeal is filed, lest convict should not serve out his entire sentence. His Majesty in Council remained part of Federal Court Rules, because on granting leave to appeal by the Federal Court one can file appeal before His Majesty in Council against the Judgment of Federal Court. Under Order XIX Rule-7 of Federal Court Rules, 1950, the Federal Court was authorized to stay the execution of sentence pending the appeal against the judgment of High Court. With the promulgation of Constitution of Pakistan, 1956, remedy before His Majesty in Council was eliminated but the appellate forum for High Court was designated as Supreme Court. Similarly, under Order XXIV Rule 5-B of Supreme Court Rules, 1956 and Order XXIII Rule 8, of Supreme Court Rules 1980, the power to stay the execution of any sentence was available to the Supreme Court at the time when petition for leave to appeal is filed or leave is granted by the Supreme Court; therefore, there is no need to recourse to the High court for suspension of sentence.

25. Even otherwise the word ‘may’ used in sub-section (2B) of section 426 Cr.P.C. makes it discretionary to grant bail to the seekers, and High Court can well refuse the same as held in case reported as “Ahmad Sher alias Sheri Bhatti Versus The State, etc.” (**2014 PSC (Crl.) 411**), and in an unreported judgment of Supreme Court passed in a case titled “Muhammad Zulfiqar versus The State, etc.” (**Criminal Petition No. 252-L of 2014**). Similar view was followed by the High Courts while refusing bail to the accused sentenced by it, considering that High Court being functus officio cannot grant bail for pending appeal before Supreme Court, particularly when earlier such relief was refused by the High Court pending appeal

before the High court. Reliance is on cases reported as “NIAZ BEEN and others Versus THE STATE” (**PLD 2018 PESHAWAR 131**); “ADIL MANSOOR Versus The STATE and 2 others” [**2017 MLD 1046 (LHR)**]; “MUHAMMAD IJAZ Versus The STATE and another” [**2013 P Cr. L J 1102 (LHR)**].

26. For what has been discussed above, we see no ground to invoke sub-section (2B) of Section 426 Cr.P.C.; the instant petition, therefore, is dismissed.

(Sadiq Mahmud Khurram) (Muhammad Amjad Rafiq)
Judge Judge

Approved for Reporting.

(Sadiq Mahmud Khurram) (Muhammad Amjad Rafiq)
Judge Judge

This order was pronounced on
06.09.2023 and after dictation
and preparation, it was signed
on 19.10.2023.

Javed *
Javed