Form No: HCJD/C-121

ORDER SHEET

IN THE LAHORE HIGH COURT,
BAHAWALPUR BENCH, BAHAWALPUR
(JUDICIAL DEPARTMENT**)**

Case No. Crl. Misc. No. 10-T 2024

Mehmood **Versus** The State, etc.

Sr. No. of order/ Proceedings	Date of order/ Proceedings	Order with signatures of Judge, and that of parties or counsel, where necessary.

29.04.2024 Mr. Shahrukh Zaman Baloch, Advocate for the petitioner.
Mr. Zafar Iqbal Soomro, Deputy District Public Prosecutor on Court's Call.

Through this petition filed under section 526 of Cr.P.C., petitioner seeks transfer of trial of a criminal case titled *"The State versus Mehmood, etc."* in FIR No. 33 dated 30.01.2023, registered under Sections 324/336/109-PPC, at Police Station Saddar Chishtian, District Bahawalnagar, from the Court of Mr. Muhammad Asif Gill, learned Magistrate Section-30 Chishtian, to any other Court of competent jurisdiction, at District Headquarter Bahawalnagar.

2. It was argued by learned counsel for the petitioner that the learned Judicial Officer being connived with the complainant has geared up the process of recording of evidence without fulfilling the requirement of fair trial and due process which is reflected from the fact that even in the days of strike, he has recorded the statement of two witnesses and is in a hurry to convict the petitioner. Further stated that the Judicial Officer and the learned counsel for the complainant belong to the same caste and the petitioner being accused of the case does not expect fair trial due to biasness of the learned Judge.

3. Heard. Record perused.

4. The apprehension of the petitioner about not expecting fair trial on the face of it is not well founded because being caste fellow or from the same brotherhood by a counsel does not mean that the Judicial Officer would lean in favour of the complainant side as otherwise case is decided on the basis of evidential record and material produced by the parties, whereas in order to avert delayed justice expeditious trial is the requirement of law. It is further

observed that petitioner has also filed another application bearing No.11-T of 2024 for transfer of case FIR No.325 dated 17.07.2022 registered under sections 324/337F(v)/34 PPC at Police Station Saddar Chishtian, District Bahawalnagar lodged by a separate complainant wherein grounds for transfer are almost identical which shows the intention of petitioner to overawe the Judicial Officer. On one hand, Judicial Officers are expected to be fair and impartial and on the other hand, it cannot be allowed that they may be subjected to undue harassment by way of moving such baseless applications seeking transfer of the cases. As observed above, the outlined grounds in the petition for seeking transfer of the above case mainly roam around the apprehension of unfair treatment due to expected biasness; therefore, it is essential to see the legal value of apprehension in such situation and the concept of biasness.

5. It is trite that mere apprehension in the mind of a party about injustice at the hands of presiding officer is no ground for transfer of a case. In a case reported as "*MUHAMMAD NAWAZ Versus GHULAM KADIR AND 3 OTHERS*" (**PLD 1973 Supreme Court 327**), Supreme Court of Pakistan has dilated upon different principles ought to govern the disposal of transfer applications of the present kind which have been spelt out by the judgments of Superior Courts from time to time. Following judgments are referred in the above cited case.

> Khawaja Ahad Shah v. Mst. Ayshan Begum (77 I C 762), Mula Naramma v. Mula Rangamma (A I R 1926 Mad. 359), Gopal Singh v. Emperor (A I R 1928 Lah. 180), Sikandar Lai Pura v. Emperor (A I R 1928 Lah. 975). Ry. Pratap Sinha Raja Sahib v. R. Srinivasagopolachariar (A I R 1926 Mad. 15), Satiandra Nath Sen and others v. Emperor (A I R 1929 Cal. 809), Asa Nand v. Emperor (130 I C 330), Gurdit Singh v. Kahan Chand (A I R 1934 Lab. 593), Girdhari Lai v. Ashfaq Ali Khan and another (A I R 1934 All. 448), Lalita Rajva rakshmi and another v. State of Bihar and another (A I R 1957 Pat. 198), Ghulam Qasim v. Langra and others (P L D 1957 Pesh.109). Ghulam Qadir Khan v. The Stare (P L D 1957 Lah. 747). Mahabat Khan v. The Stare and another (P L D 1960 Lab. 1187), Sardar Khan v. The State and another (P L D 1962 Kar. 77), The State v. Agha Badarudain (P L D 1962 Kar. 166). Abdul Aziz v. The State and another (P L D 1962 Lab. 56), Refatullah Pramanik and another v. The State and another (P L D 1965 Dacca 150), and Rahim Bakhsh v. Khalilur Rehman (P L D 1971 Lah 517),

and Supreme Court while focusing on the reasonableness of 'apprehension' endorsed the observations given in "*Rahim Bakhsh v. Khalilur Rehman"* **(P L D 1971 Lah 517)** supra, which are as follows;

> "What is a reasonable apprehension must be decided in each case with reference to the incidents and the surrounding circumstances; and the Court must endeavour, as far as possible, to place itself in the position of the applicant seeking transfer, and look at the matter from his point of view, having due regard to his state of mind and the degree of Intelligence possessed by him. Nevertheless, it is not every incident regarded as unfavourable by the applicant, which would justify the transfer of the case. The test of reasonableness of the apprehension must be satisfied, namely, that the apprehension must be such as a reasonable man might justifiably be expected to have."

In another case reported as "*DAUD IQBAL PERVAIZ and another versus THE STATE*" (**PLD 1990 Supreme Court 705**), the Supreme Court again while referring *Rahim Bakhsh v. Khalilur Rehman* (P L D 1971 Lah 517) supra focused on the reasonableness of apprehension and held as under;

> In case the submission of the learned counsel is accepted then in each and every case of sensational kind, where the people of the, locality become agitated and get aroused by the nature of the occurrence, no trial will be possible in a Court of the district where the occurrence has taken place, only because of the initial wave of the indignation felt by the local populace and the attempt of the authorities to see that the accused persons are arrayed before the Court of law as soon as possible. The acceptance of such a principle would indeed be fraught with danger and mischief The safeguard for the accused is that the Court should carefully weigh whether the apprehension being expressed is really such as a "reasonable man" might justifiably be expected to have in the facts and circumstances of the case; if so, it should transfer the case, but, if not, let the case proceed where it is to be tried normally**.**"

Thus, mere apprehension in the mind of party is no ground to order for transfer of case unless it is supported by any material or the circumstances. In a case reported as "*Aqa Syed ASGHAR HUSSAIN Versus THE STATE*" (**1968 SCMR 381**), Supreme Court says as under;

> "In a case of this nature this Court ordinarily does not interfere with the order of the High Court. The petitioner's case is solely based on his oral allegation. The Court before accepting it must be fully satisfied that his statement is so strongly corroborated by other circumstances that no reasonable person could possibly doubt its correctness. In the absence of any such corroboration the learned Single Judge was justified in refusing to accept the oral allegation of the accused"

6. Supreme Court of Pakistan in another case reported as "*MUHAMMAD ARSHAD versus THE STATE*" (**1997 SCMR 949**),

has held that mere on the basis of 'apprehension' case cannot be transferred; factually it was in following terms;

> "The fact that the deceased is a brother of the Senior Judge of the High Court, does not lead to the conclusion that the learned trial Judge is overawed by this situation. Merely because of this relationship, presumption cannot be drawn that the learned trial Judge ~is prejudiced against the petitioner. In order to make out a case for transfer, clear and cogent averment should be made which may lead to the conclusion that the conduct of the learned trial Judge is not proper and is prejudiced. The transfer will be justified if there is a reasonable apprehension in the mind of a party that the Court would not be able to act fairly and impartially in the matter. Such impression should not be based on apprehensions or presumptions but should be substantiated with facts which tarnished the impartiality of the Court. The principles for governing disposal of transfer application are set out in Muhammad Nawaz v. Ghulam Kadir and others (PLD 1973 Supreme Court 327)."

Similarly, in a case reported as "*SARDAR KHAN and others Versus MUHAMMAD AFZAL and others*" (**2013 PSC Criminal 22)**, Supreme Court of Pakistan has declined the request for transfer of case which was sought on the ground that a senior lawyer of a bar was murdered and no counsel from that district was ready to accept brief of the accused.

7. Bias of a judge can be projected or highlighted through petition for seeking transfer of case, if it is ascertained from his action or from any other material on the record. Supreme Court of Pakistan while dealing with application for transfer of case highlighted different situations as examples of bias for disqualification of judge to hear the case and held that if bias is based on pecuniary or proprietary interest, small the interest may be, it operates as a disqualification but mere suspicion of bias, even it is not unreasonable, is not sufficient to render decision void. Case reported as "*Ms. BENAZIR BHUTTO versus THE PRESIDENT OF PAKISTAN and another*" (**1992 SCMR 140**) is referred in this respect.

The Supreme Court of India in a case reported as, "*MANAK LAL, Advocate Versus DR. PREM CHAND SINGHVI and others*" (**PLD 1957 Supreme Court (Ind.) 346**), observed that in dealing with cases of bias attributed to members constituting tribunals, it is necessary to make a distinction between pecuniary interest and prejudice so attributed. It is obvious that pecuniary interest however small it may be in a subject-matter of the proceedings, would wholly

disqualify a member from acting as a Judge. But where pecuniary interest is not attributed but instead a bias is suggested, it often becomes necessary to consider whether there is a reasonable ground for assuming the possibility of a bias and whether it is likely to produce in the minds of the litigant or the public at large a reasonable doubt about the fairness of the administration of justice, it would always be a question of fact to be decided in each case. Supreme Court focused on the relevant principle as under;

> "The principle, says Halsbury, nemo debt esse judex in causa propria sua, precludes a justice who is interested in the subject-matter of a dispute, from acting as a justice therein". (Halsbury's Laws of England Vol. XXI, p. 535 para. 952). In our opinion, there is and can be no doubt about the validity of this principle and we are prepared to assume that this principle applies not only to the justices as mentioned by Halsbury but to all tribunals and bodies which are given jurisdiction to determine judicially the rights of parties"

Likewise, Federal Court of Pakistan in an elaborated judgment reported as "*ANWAR and another versus THE CROWN"* **(PLD 1955 Federal Court 185)** has given a detailed expression of bias; one of kinds as arising from bribery was referred in above judgment in following terms;

> As regards the bias arising from bribery, reference may usefully be made to' Lord Bacon's impeachment before the House of Lords. Though judicial bribery was rampant in the England of Bacon's times, the practice was pronounced as most culpable and disgraceful. In one of his vigorous sermons Hugh Latimer thus denounced this vice:
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> "I am sure this is scala inferni, the right way to hell, to be covetous, to take bribes, and pervert justice. If a Judge should ask me the way to hell. I would show him this way. First, let him be a covetous man; let his heart be poisoned with covetousness. Then let him go a little farther, and take bribes; and, lastly, pervert judgment: Lo, there is the mother, and the daughter, and the daughter's daughter. Avarice is the mother; she brings forth bribe-taking, and bribe-taking perverting of judgment. There lacks a fourth thing to make up the mess, which, so help me God, if I were a Judge, should be hangum tuum, a Tyburn tipped to take with' him; and it were the Judge of the King's Bench my Lord Chief Justice of England, yea, and it were my Lord Chancellor himself, to Tyburn with him. He that took the silver basin and ewer for a bribe, thinketh that it will never come out. But he may now know that I know it, and I know it not alone; there be more beside me that know it. Oh, briber and bribery! He was never a good man that will so take bribes. It will never be merry in England till we have the skins of such'.

Bias of a magistrate or judge can also be gauged from the fact that he has not allowed the prosecutor to conduct trial and himself took the position as prosecutor, then whole trial stands vitiated as held in "*Adan Haji Jama and others v. The King"* **(1948 A C 225)**, which

has been referred in above cited reported case "*ANWAR and another versus THE CROWN"* **(PLD 1955 Federal Court 185).**

8. As cited above, Halsbury says that the principle, "nemo debt esse judex in causa propria sua" precludes a justice who is interested in the subject-matter of a dispute, from acting as a justice therein". [1] It is the principle of Natural Justice. According to this maxim, the authority giving decision must be composed of impartial persons and should act fairly, without prejudice and bias. This principle also gets light from a case of UK Court reported in Pakistan as "*TERRANCE WILLIAMS Versus PENNSYLVANIA"* **(2016 SCMR 1561),** in following terms;

> At common law, a fair tribunal meant that "no man shall be a judge in his own case." 1 E. Coke, Institutes of the Laws of England §212, *141a ("[A]liquis non debet esse judex in propiâ causâ"). That common-law conception of a fair tribunal was a narrow one. A judge could not decide a case in which he had a direct and personal financial stake. For example, a judge could not reap the fine paid by a defendant. See, e.g., Dr. Bonham's Case, 8 Co. Rep. 107a, 114a, 118a, 77 Eng. Rep. 638, 647, 652 (C. P. 1610) (opining that a panel of adjudicators could not all at once serve as "judges to give sentence or judgment; ministers to make summons; and parties to have the moiety of the forfeiture"). Nor could he adjudicate a case in which he was a party. See, e.g., Earl of Derby's Case, 12 Co. Rep. 114, 77 Eng. Rep. 1390 (K. B. 1614). But mere bias-without any financial stake in a case-was not grounds for disqualification. The biases of judges "cannot be challenged," according to Blackstone, "[f]or the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea." 3 W. Blackstone, Commentaries on the Laws of England, 361 (1768) (Blackstone); see also, e.g., Brookes v. Earl of Rivers, Hardres 503, 145 Eng. Rep. 569 (Exch. 1668) (deciding that a judge's "favour shall not be presumed" merely because his brother-in-law was involved).

9. Similar principle is in vogue in our jurisdiction as embodied in section 556 of Cr.P.C which is reproduced as under;

> **556. Case in which Judge or Magistrate is personally interested**: No Judge or Magistrate shall, except with the permission of the Court to which an appeal lies from his Court, try any case to or in which he is a party, or personally interested, and no Judge or Magistrate shall hear an appeal from any judgment or order passed or made by himself.
>
> **Explanation**: A Judge or Magistrate shall not be deemed a party, or personally interested, within the meaning of this section, to or in any case by reason only that he is a Municipal Commissioner or otherwise concerned-therein in a public capacity, or by reason only that he has viewed the place in which an offence is alleged to have been committed, or any other place in which any other transaction material to the case is alleged to have occurred, and made an inquiry in connection with the case.

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1. (Halsbury's Laws of England Vol. XXI, p. 535 para. 952)

Illustration

> A, as Collector, upon consideration of information furnished to him directs the prosecution of S for a breach of the Excise Laws. A is disqualified, from trying this case as a Magistrate.

Magistrate or Judge however, shall not be considered as party or personally interested if the situation is like one mentioned in the explanation attached to above section. In a case reported as *"ISLAMIC REPUBLIC OF PAKISTAN THROUGH SECRETARY, MINISTRY OF INTERIOR AND KASHMIR AFFAIRS, ISLAMABAD versus ABDUL WALI KHAN, M. N. A., FORMER PRESIDENT OF DEFUNCT NATIONAL AWAMI PARTY"* **(P L D 1976 Supreme Court 57),** when an objection was raised about sitting of two honourable judges in the bench on the basis of personal bias, collected from the facts that one honourable judge before his elevation was a Secretary in the Ministry of Law and Parliamentary Affairs, Government of Pakistan, he might have, in that capacity, had occasion to deal with the question of the banning of the National Awami Party at some stage or the other, but Supreme Court rejected such objection with the observation that the examination of the question of the banning of the Party was done mainly by the Ministry of Interior, Government of Pakistan and not the Ministry of Law. Similarly, allegation against other honourable judge was that since he has already dealt with the question of the continuance of the detention of Mr. Abdul Wali Khan and some other leaders of the National Awami Party as Chairman of the Advisory Board, constituted under clause (iv) of 8 Article 10 of the Constitution of the Islamic Republic of Pakistan, 1973, he has already dealt with the bulk of the material which forms the basis for the banning of the Party as well and, therefore, he must be held to have made up his mind one way or the other and thus disqualified himself from sitting on the Bench. It was responded by the Supreme Court that it cannot be treated as a sufficient ground for disqualifying the judge and observed as follows;

> "As pointed out by the learned editors of American jurisprudence even "at common law bias or prejudice on the part of a Judge, not the result of interest or relationship, is not supposed to exist, and generally it does not incapacitate or disqualify a Judge to try a case, unless the Constitution or statute so provides"-(vide American Jurisprudence, Vol. 30, page 774, paragraph 74).

> The basis of the disqualification, therefore, is "personal bias or prejudice" of such a nature as would necessarily render a Judge unable to exercise his functions impartially in a particular case, and this must be shown as a matter of fact and not merely as a matter of opinion. In the absence of any constitutional or statutory bar a Judge is not disqualified from sitting at a trial of a person merely because previously he had participated in other legal proceedings against the same person, whether in the capacity of a Judge or of an Administrative Tribunal or official, it makes no difference. There is abundant authority from the American Jurisdiction to support tire view that the mere fact that a Judge has dealt with another matter concerning the same person in another capacity does not necessarily disqualify him from sitting as a Judge at the trial of that person."

The Supreme Court has finally regarded such types of objections as baseless while holding in following terms;

> To accede to such a plea of bias would lead to very fantastic results, for, then even a Judge who may have refused to grant ad interim bail or injunction in a pending cause or appeal would find himself disqualified from hearing the appeal. Similarly, a judge who may have given a decision in one matter against a particular person in one capacity would be disqualified from being a Judge in any other matter in which the same person is a party for ever. This is clearly not the law and it could never have been the intention of the law to impute such universal bias to Judges.

10. In "*TERRANCE WILLIAMS Versus PENNSYLVANIA*" **(2016 SCMR 1561)** cited above, it is referred that in America, National and State legislatures enacted statutes and constitutional provisions that diverged from the common law by requiring disqualification when the judge had served as counsel for one of the parties. The first federal recusal statute, for example, required disqualification not only when the judge was "concerned in interest," but also when he "ha[d] been of counsel for either party, but many States followed suit by enacting similar disqualification statutes or constitutional provisions expanding the common-law rule**,** (deciding that it was for the judge to choose whether he could fairly adjudicate a case in which he had served as a lawyer for the plaintiff in the same action). Courts applied this expanded view of disqualification not only in cases involving judges who had previously served as counsel for private parties but also for those who previously served as former attorneys general or district attorneys. It was held as under;

> "This expansion was modest: disqualification was required only when the newly appointed judge had served as counsel in the same case. In Carr v. Fife, 156 U. S. 494 (1895), for example, this Court rejected the argument that a judge was required to recuse because he had previously served as counsel for some of the defendants in another matter. Id., at 497-498. The Court left it to the judge "to decide for himself whether it was improper for him to sit in trial of the suit." Id., at 498. Likewise, in

> Taylor v. Williams, 26 Tex. 583 (1863), the Supreme Court of Texas acknowledged that a judge was not, "by the common law, disqualified from sitting in a cause in which he had been of counsel" and concluded "that the fact that the presiding judge had been of counsel in the case did not necessarily render him interested in it." Id., at 585-586. A fortiori, the Texas court held, a judge was not "interested" in a case "merely from his having been of counsel in another cause involving the same title." Id., at 586 (emphasis added); see also The Richmond, 9 F. 863, 864 (CCED La. 1881) ("The decisions, so far as I have been able to find, are unanimous that 'of counsel' means 'of counsel for a party in that cause and in that controversy,' and if either the cause or controversy is not identical the disqualification does not exist"); Wolfe v. Hines, 93 Ga. 329, 20 S. E. 322 (1894) (same); Cleghorn v. Cleghorn, 66 Cal. 309, 5 P. 516 (1885) (same).”

11. However, a little deviation in the principle with respect to district courts is found in our jurisdiction in the sense that a Magistrate cannot sit to hear the case if he had practiced as a pleader in the court of Magistrate in such district as mentioned in following section of Cr.P.C.;

> **557. Practicing pleader not to sit as Magistrate in certain Courts:** No pleader who practices in the Court of any Magistrate in a district, shall sit as a Magistrate in such Court or in any Court within the jurisdiction to such Court.

As a result, thereof he can recuse from the case.

12. Adversaries in a criminal prosecution, no doubt, are the private parties but State as an important and impartial pillar in between two through the institution of Public Prosecution, is expected to ensure fair trial, due process and equal opportunities to both parties so as to fade out the impression of bias in the mind of a judge against any party. As per para 4.17 of Code of Conduct for Prosecutors issued under section 17 of the Punjab Criminal Prosecution Service (Constitution, Functions and Powers) Act, 2006 it is the duty of a prosecutor that in accordance with the law or the requirements of fair trial, he shall seek to ensure that all necessary and reasonable enquiries are made and the responses taken into account while taking prosecutorial decisions.

13. In the light of above discussion, it was observed that learned counsel for the petitioner has not pointed out any material through which it could be inferred that learned Magistrate is personally interested in the case or is biased towards the petitioner in any manner. Allegation of bribery was also not made expressly nor advocated vigorously; so much so, it was conceded that trial is at initial stage, therefore, mere on the basis that magistrate is the caste fellow of counsel for the complainant and is conducting trial expeditiously, alleged

biasness cannot be anticipated at this stage of the proceedings; therefore, this petition merits outright dismissal which is dismissed accordingly with no orders as to the costs.

(MUHAMMAD AMJAD RAFIQ)
JUDGE

Approved for reporting

Judge

Signed on: 03.05.2024

*M. Azhar **