

ORDER SHEET
IN THE LAHORE HIGH COURT, LAHORE.
JUDICIAL DEPARTMENT
Criminal Miscellaneous No.40397-M/2024.

Rai Muhammad Aslam Vs. Additional Sessions Judge, etc.

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

[2]	28.10.2024.	Mr. Zulfiqar Ali Dhudhi, Advocate for the petitioner. Syed Muntazir Mehdi Bukhari, ADPP with Zulfiqar ASI. Rai Zameer ul Hassan, Advocate for respondent No.3.
-----	-------------	--

This petition assails order dated 07.06.2024, passed by learned Additional Sessions Judge, Hafizabad, whereby accused/respondent Rai Muhammad Aslam Kharal was permanently exempted from his appearance in the trial on the ground that he is earning his livelihood abroad; though learned Magistrate by virtue of order dated 08.05.2024 had dismissed his application.

2. Learned counsel for the petitioner states that vent under sections 540A and 205 in Code of Criminal Procedure 1898 (the Code) accommodates the accused to appear and seek exemption of his attendance in the trial if he is incapable of remaining before the Court contingent upon happening of an event like illness and other infirmities or disabilities yet this facility is available only for a certain period and such sections cannot be interpreted in the manner so as to accommodate the “earning of livelihood abroad” which of course is the wrong interpretation.

3. On the other hand, learned counsel for respondent No.3 states that it was a case under section 337A(ii) Pakistan Penal Code 1860 (PPC) and respondent was under the allegation of hurling lalkara only; he being National of Great Britain while appearing in the Court has sought his permanent exemption of attendance in the trial and the course adopted by learned Additional Sessions Judge by permitting him to appear through two dignified lawyers is well within the parameters of law because the words used in

section 540A of the Code “incapable of remaining before the Court” supports the idea. In this respect, learned counsel for the respondent has placed reliance on the cases reported as “Haji AURANGZEB versus MUSHTAQ AHMAD and another” (**PLD 2004 Supreme Court 160**), “MUHAMMAD NAWAZ versus The STATE and another” [**2015 PCr.LJ 58 (Lahore)**] and “AFTAB AHMAD versus The STATE through Assistant Advocate-General, Rawalkot” [**2019 PCr.LJ 267 [Shariat Court (AJ & K)]**] and states that incapacity does include ‘earning livelihood abroad’.

4. I have gone through the impugned order and attended the contentions of learned counsel (s) for the parties

5. The Supreme Court of Pakistan in “Haji AURANGZEB versus MUSHTAQ AHMAD and another” (**PLD 2004 Supreme Court 160**) though has denied relief of exemption from trial to the accused who was abroad yet only on ground that at the time of filing application accused was not before the Court; however, it did not declare that being abroad cannot be read as “incapable of remaining before the Court”. Thus, held as under;

“.....the provisions of section 540-A, Cr.P.C. are to be interpreted with benevolence, because it is an enabling provision not meant to punish someone. The section, in the circumstances, aims at achieving three-fold benefit. One benefit being that of the exempted accused, second being that of the co-accused under trial and third being the convenience of the Court itself. To my mind the only lacking feature in the instant case is that the accused asking for exemption has not been present before the Court. For this one and the only short coming, the grant of exemption was rightly denied to him.

That was the reason this Court in a case reported as “MUHAMMAD NAWAZ versus The STATE and another” [**2015 PCr.LJ 58 (Lahore)**] has held that “incapable of remaining before the Court” does include earning of livelihood abroad. Same was the ratio of case reported as “AFTAB AHMAD versus The STATE through Assistant Advocate-General, Rawalkot” [**2019 PCr.LJ 267 [Shariat Court (AJ & K)]**]. Thus, learned counsel for respondent/accused has rightly

pointed out the legal position as settled through case laws cited by him as well as the followings;

“MUHAMMAD LATIF versus ZAHEER IQBAL and another” [2020 MLD 160 (AJ & K High Court); “INTIZAR HUSSAN and another versus AMJAD HUSSAIN and another” [2023 PCr.LJ 596 (Islamabad)]; “Raja PERVEZ ASHRAF Versus FEDERATION OF PAKISTAN through Secretary Ministry of Interior, Islamabad and 2 others” (PLD 2020 Islamabad 24); and “SAJJAD AKBAR versus The STATE through Advocate General Khyber Pakhtunkhwa, Peshawar and 3 others” [2022 MLD 1325 (Peshawar)].

6. Section 540A of the Code is an enabling provision as held by Supreme Court of Pakistan as well, therefore, it is essential to see it again to discover the possibilities under such section. For reference section is reproduced as follows;

540-A. Provision for inquiries and trial being held in the absence of accused in certain cases: (1) At any stage of an inquiry or trial under this Code, where 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 the 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, and for reasons to be recorded by him either adjourn such inquiry or trial, or order that the case of such accused be taken up or tried separately.

The word “incapable” was derived from Late Latin word “incapābilis” which literally means unable to do or achieve (something); unable to behave rationally or manage one's affairs. In this context ageism has become institutionalized and contributes to the view that elderly people are socially redundant, incapable and dependent. Keeping in view the above definition, following could be the reasons for accused to hold them incapable of remaining before the Court;

“Advance age, child, woman particularly Parda-Nasheen lady, infirm, sick, epidemic outbreak, bereavement in family, ceremonial occupations, festive occasions, law and order situation, national duty, election affairs, religious duty, official commitments or duty, professional trainings

inland or abroad, medical treatment abroad, earning of livelihood out of city or abroad, visit abroad, dual national,”

Above list is not exhaustive which would include any other situation arising out of exigency or emergency response. Section 540A of the Code requires personal attendance of accused for seeking exemption, therefore, exemption of one day or two due to certain emergency situation in the absence of accused would not be legally permissible under such section, however, Court by virtue of its inherent power can allow such exemption.

7. Exemption of accused from attendance for a longer period is always read as detrimental to expeditious trial but legislator has also taken care of such issue while introducing Section 540(2) of the Code which is a saving clause for the regime of criminal trial; it guarantees course and measures for uninterrupted process during the trial. It suggests that at any stage Court can direct the attendance of exempted accused or if his pleader does not represent him, Court can safely adjourn such inquiry or trial, or order that the case of such accused be taken up or tried separately which of course would not affect the case of co-accused. Even otherwise for every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately (Section 233 of the Code), whereas joint trial of different accused is only an exception as mentioned in section 239 of Cr.P.C. Court can resort to all permissible coercive measures side by side for procuring the attendance of exempted accused including issuance of warrants for execution under sections 82 or 93B of the Code (within or out of country) followed by process of proclamation and attachment of property. (Sections 87 & 88 of the Code)

8. No doubt expeditious trial is the hallmark of criminal justice system and Chapter-2, Part-II of the Constitution of the Islamic Republic of Pakistan 1973 (the Constitution)

dealing with Principles of Policy (Articles 29-40) on the strength of Article 37(d) ordains that “it is the constitutional duty to ensure inexpensive and expeditious justice.” Article 29 of the Constitution states that it is the responsibility of each organ and authority of the State, and of each person performing functions on behalf of an organ or authority of the State, to act in accordance with those Principles in so far as they relate to the functions of the organ or authority. Article 29 (2) of the Constitution says that in so far as the observance of any particular Principle of Policy may be dependent upon resources being available for the purpose, the principle shall be regarded as being subject to the availability of resources.

Availability of resources of course includes cooperation of parties, existence of sound processes or measures to take the offender on to the trial for early decision of the cases. If the processes are weak or not responding in due course of time then Court should resort to alternatives to ensure expeditious justice. Applying above theme on the situation that if time and again attendance of accused delays the process, then it is the bounden duty of the Court to exempt him from appearance and continue with trial in the presence of his counsel, and on default, adjourn or separate his trial.

9. Section 353 of the Code requires recording of evidence in the presence of accused or in presence of his counsel if his attendance has been dispensed with. Though this section talks about physical presence of accused but in case reported as “MUHAMMAD HANIF VS THE STATE ETC.” (PLJ 2023 Cr. C 412), while dealing with mental disability, it was held that mental presence of accused is also essential otherwise trial would a farce. Similarly, as an alternative his ‘physical presence’ can also be substituted with his ‘virtual presence’ by the use of modern technology like video link (live link, skype etc.), which has

not been specifically prohibited. The Supreme Court of Pakistan in a case reported as “MEERA SHAFI Versus ALI ZAFAR” (**PLD 2023 Supreme Court 211**) has recommended the idea of ‘**Virtual Attendance**’ substituting it with actual or physical presence. It has further been required from the Courts to extend the application of statutes to new things in order to respond the changing social realities of the time. It has held as under;

“In order to answer the above question, it is important to highlight the conceptual role of a court in a constitutional democracy. The role of a judge is to understand the purpose of law in the society and to help the law achieve its purpose. Law is a living organism and must respond to the changing social realities of the time. Indeed, when social reality changes, the law must change too. Just as the change in social reality is the law of life, responsiveness to change in social reality is the life of the law.”

Further that

“The principle of extension of statutes to new things, referred to by this Court in the Fakir Muhammad case in 1958, has over the years been crystallized into the principle of "updating construction" of statutes. As the constant formal updating of all laws by the legislature is not practicable and each generation mostly lives under the law it inherits, the legislature is presumed to have intended that the laws enacted by it should ordinarily be taken as "always speaking" and applied at any future time in such a way that gives effect to its intention in the changed circumstances that have occurred since the enactment of the law. This is commonly called the "updating construction" of laws.⁵ The changes that require the updating construction of law may include technological or scientific developments, new natural phenomena or changes in social conditions, etc. 'It is not difficult to see why an updating construction of legislation is generally to be preferred. Legislation is not and could not be constantly re-enacted and is generally expected to remain in place indefinitely, until it is repealed, for what may be a long period of time.'”

In the said judgment it was also held that regarding the procedural law, it is a well-settled principle that the Courts are not to act upon the principle that every procedure is to be taken to be prohibited unless it is expressly provided for by the law, but on the converse principle that every procedure is to be understood as permissible till it is shown to be prohibited by law.

Therefore, allowing modern technology of video conferencing to be read into the exiting enactments enhances access to justice, promotes fair trial and introduces inexpensive and expeditious justice thereby advancing the fundamental rights under Articles 9 and 10A and principle of policy under Article 37(d) of the Constitution. In a case reported as “Khawaja ANWER MAJID Versus NATIONAL ACCOUNTABILITY BUREAU through Chairman NAB and another” (**PLD 2020 Supreme Court 635**), Supreme Court of Pakistan while granting bail to the accused therein permitted him to join investigation as and when required by the NAB and also ensure his representation before the Accountability Court, either personally or through video link, whichever is found convenient under the circumstances. In the event of physical incapacity, his request for dispensation and representation through a counsel shall be considered most thoughtfully. In a case reported as “IMRAN AHMAD KHAN NIAZI Versus SPECIAL JUDGE, (Anti-Terrorism Court), Lahore and 3 others” (**PLD 2004 Lahore 486**), a Division Bench of this Court, in the backdrop of particular circumstances, allowed the accused to appear in pre-arrest bail proceedings via Video link.

10. Francis Bennion has set out the principle of interpretation in his commentative titled "Statutory interpretation" 2nd Edition Page 617. According to him "Acts can be divided into two categories, namely, the usual case of the Act that is intended to develop its meaning with developing circumstances (which may be called an ongoing Act) and the comparatively rare case of the Act that is intended to be of unchanging effect (a fixed-time Act)". In cases reported as “MUNAWAR HUSSAIN and another Versus The STATE” (**2020 PCr.LJ 1184**) & “MUHAMMAD ISRAR Versus the STATE and another” (**PLD 2021 Peshawar 105**) Courts have held that the Code, is an ongoing statutory instrument and that doctrine “contemporanea expositio est optima et fortissima

in lege” which means that a contemporary explanation or interpretation of a statute is the best and strongest (the language of a statute must be understood in the sense in which it was understood when it was passed), has no application while interpreting the Code. Thus, on the strength of above referred case law, it is held that presence of accused during the trial through modern means like video link etc. will not be illegal in any manner.

11. Attendance of the accused can be procured at any stage including for hearing of the judgment because section 366 (2) Cr.P.C. requires that judgment must be pronounced in the presence of accused but where his personal attendance during the trial has been dispensed with and the sentence is one of fine only or he is acquitted, either of which cases it may be delivered in the presence of his pleader. In other case, if the accused did not appear, it will not preclude the Court to pronounce it in his absence because section 366(3) says that no judgment delivered by any Criminal Court shall be deemed to be invalid by reason only of the absence of any party or his pleader on the day or from the place notified for the delivery thereof, or of any omission to serve, or defect in serving, on the parties or their pleaders, or any of them, the notice of such day and place. Thus, even if the accused is convicted in his absence, still perpetual warrant of his arrest can be issued to make it directive for serving out the sentence passed against him.

12. It is trite that there is difference between conviction and sentence; conviction is a guilty verdict while sentence is a period of imprisonment or probation to be served out or payment of fine under such guilty verdict. Though corporal punishment plays an important role in eradication of vices and also helps to lower the crime rate yet conviction is also a major obstacle for individuals to penetrate into the society with respectable protocols.

Criminal justice system though focusses on prevention, eradication and elimination of vices from the society yet by introducing different sentencing policies, main focus is on correction, reformation and rehabilitation of offenders to make them useful citizen. Stigma of conviction can only be vanished by the judicial verdict of higher forum whereas sentence can also be waived of or regulated by the executive authority of government or by the President, by way of remission, commutation or by grant of pardon, reprieve and respite, as per Sections 54 & 55 of PPC, Sections 401, 402 & 402A of the Code and Article 45 of the Constitution respectively.

Keeping the sentence apart, conviction plays a vital role in deterrence and prohibition against the crimes because conviction solely brings many restrictions on the convicted persons; some of which can be calculated as under;

1. **Disqualification of a Convict from being Member of Parliament** as per Article 63 of the Constitution and under sections 231 and 232 of the Election Act, 2017.
2. **Section 15 of the National Accountability Bureau Ordinance, 1999** also disqualifies a convict to contest election or hold Public Office for a period of 10 years and to apply for or be granted or allowed any financial facilities in the form of any loan or advances or other financial accommodation by any bank or financial institution owned or controlled by the Government for a period of 10 years from the date of conviction.
3. **Article 3 of the Qanun-e-Shahadat Order, 1984** bars the competency of a convict of Perjury, to be a witness unless the court is satisfied about his repentance and mending ways.
4. A convicted person is also **disqualified to be a Civil Servant** and if being a public servant is convicted for a particular criminal case, he stands disqualified to hold the office as a consequence of that conviction. **Section 8 of the Punjab Employees Efficiency, Discipline and Accountability Act, 2006** and the Punjab Civil Servants (Efficiency and Discipline) Rules are referred.
5. **Enhanced punishment** for certain offenders under Chapter XII or Chapter XVII after previous conviction. (**Section 75 of PPC**). **Section 11 of the**

Probation of Offenders Ordinance 1960 for repetition of same offence.

6. **Rule-23 (d)**, Passport Rules, 2021 formulated under the Passport Act, 1974 provides for **impounding, confiscation, cancellation and inactivation of Passport** if any Pakistani is convicted in the host country of a crime involving moral turpitude.

7. The **Arms Policy 2012** issued by the Ministry of Interior, Government of Pakistan **disqualify** and debars all convicted persons, except those convicted for minor offences or traffic violations, from acquiring any kind of **arms licence**.

8. **Sections 18-20 of the Provincial Motor Vehicles Ordinance, 1965** empower the Court convicting a person to be disqualified to hold a driving licence for a particular period.

9. **Section 20(9) of the Financial Institutions (Recovery of Finances) Ordinance, 2001** provides for ineligibility to receive any loan, advance or finance upon conviction of offence of willful default by a Banking Court.

10. **Section 3(4) of the National Database and Registration Authority Ordinance, 2000** places a prohibition upon a convict to be the Chairman of the establishment.

Thus, conviction alone is a great impediment to flourish in the society peacefully and effectively.

13. There is an apprehension that taking the accused in the process of trial through video link would jeopardize the sanctity of Courts and protection of judges if the accused on the other side join it through his house or workplace and create any obstruction or commit contempt of court by words or by other means. Section 352 of the Code says that “**Courts to be open**” which means that the place in which any Criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed an open Court, to which the public generally may have access, so far as the same can conveniently contain them. As such live telecast of Court proceedings is permissible under said section. The only requirement is the control of judge to maintain the

Court decorum which can be managed as per proviso of said section; it says as under;

“Provided that the Presiding Judge or Magistrate may, if he thinks fit, order at any stage of any inquiry into or trial of, any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the Court.”

If the Judge suspects that he cannot control the situation of other side on video link when the accused joins the process from his house or work place, he can direct to an appropriate authority for alternate arrangement for appearance of accused on video link if he is in Pakistan or if abroad, to pass on such direction to concerned High Commission for arrangement of place suggested by the Commission. Thus, during the trial if the accused is incapable of remaining before the Court, he can seek his physical exemption for appearance either through lawyer or through virtual presence on video link.

14. Consequently, order dated 07.06.2024, passed by the learned Additional Sessions Judge, Hafizabad does not call for any interference by this Court. Before parting with this judgment, I acknowledge and appreciate the efforts of Mr. Balal Munir, Civil Judge/Research Officer who collected and provided relevant material in support of question involved in this case.

15. For what has been discussed above, this petition is **dismissed.**

(MUHAMMAD AMJAD RAFIQ)
JUDGE

Signed on 11.11.2024.

Gulzar*

APPROVED FOR REPORTING.

(MUHAMMAD AMJAD RAFIQ)
JUDGE