

ORDER SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

Crl. Misc. No.129-B-2021

Naveed Hayat Malik 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.
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01.03.2021	<p>M/s Sardar Muhammad Latif Khosa, Sardar Shahbaz Ali Khan Khosa, Raja Rizwan Abbasi, Muhammad Shoaib Shaheen, Syed Khawar Ameer Bukhar, Mr. Sohail Akbar Chaudhry, Ch. Muhammad Haseeb, Mr. Fareed Hussain Kaif, Raja Muhammad Saad, Mr. Talha Ahmad, Mr. Zulfiqar Ali Abbasi, Advocate, Raja Aleem Khan Abbasi, Syed Qamar Hussain Sabzwari, Qazi Adil Aziz, Mr. Javed Iqbal Wains, Sh. Ahsan ud Din, Hafiz Muhammad Asif Hamdani, Mr. Javed Salim Sorish and Syed Shajjar Abbas Hamdani, Advocates for the petitioners.</p> <p>Ms. Khadija Ali and Mr. Majid Rashid, State Counsel.</p> <p>Mr. Khalid Mehmood Awan, SDPO</p> <p>Mr. Abdul Jabbar Khan, Inspector/IO.</p>
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AAMER FAROOQ J. Through the instant petition, petitioners No.1 & 3 namely Naveed Hayat Malik s/o Muhammad Hayat Malik and Nazia Bibi w/o Ghulam Nabi seek bail after arrest in case FIR No.99 dated 08.02.2021 under sections 395/228/506/440/341/342/353/186/147/149 PPC and 7 ATA registered at P.S. Ramna, Islamabad.

2. The case of the prosecution, against the petitioners, is that on 08.02.2021 at about 9:30 a.m., a number of lawyers left F-8 Katchery,

Islamabad towards Islamabad High Court and at about 10:05 a.m., about 250 to 300 lawyers, including *inter alia* the aforementioned petitioners, blocked the Main Road of the High Court and forcibly entered the compound; they went towards Chief Justice's Block and on their way, broke the windows of said Block and destroyed the plants; they encircled the Chief Justice Block, uttered unacceptable words, pelted the doors and building with stones and after entering the corridor, entered into the Chambers of Hon'ble Chief Justice and took him hostage; they also beat up representative of ARY Channel and forcibly tried to snatch weapons of police officials performing security duties; they threatened the staff, broke the windows and also endangered the lives of staff by throwing gas cylinder used as fire extinguisher. The Judges of the High Court came for help of the Chief Justice of the Court but only succeeded to rescue him after a considerable period of time, during which, the Hon'ble Chief Justice remained hostage. The motive, for doing so, was demolition of the lawyers chambers situated near F-8 Courts.

3. The petitioners applied for bail after arrest before Anti-Terrorism Court-I, Islamabad, which was dismissed vide order dated 12.02.2021, hence the petition.

4. Sardar Muhammad Latif Khosa, Senior Advocate Supreme Court, appearing on

behalf of petitioners, *inter alia* contended that petitioner No.3 is in the family way, hence concession of bail, be granted to her. It was contended that petitioner No.1 was not present at the scene of occurrence but came in later; that he is a senior Member of the Bar; that he has remained the President of District Bar Association, Islamabad; that under the facts and circumstances, section 395 PPC is not attracted and even provisions of Anti Terrorism Act, 1997 are not attracted inasmuch as in the FIR or in the statements, it is not mentioned that any weapon of offence was used. Learned counsel contended that in light of recent judgment of Hon'ble Supreme Court of Pakistan as well as this Court, petitioner No.1 is entitled to concession of bail. Reliance was placed on cases reported as 'Khawaja Salman Rafique and another Vs. National Accountability Bureau through Chairman and others' (PLD 2020 Supreme Court 456), 'Ghulam Hussain and others Vs. The State and others' (PLD 2020 Supreme Court 61), 'Manzoor and 4-others Vs. The State' (PLD 1972 Supreme Court 81) and case titled 'Amjad Mustafa Malik Vs. D.G. NAB etc.' (W.P. No.769-2019).

5. Raja Rizwan Abbasi, Advocate also appearing on behalf of petitioner No.1 *inter alia* contended that in light of guidelines issued by the Hon'ble Supreme Court of Pakistan in case reported as 'Ghulam Hussain and others Vs. The State and others' (PLD

2020 Supreme Court 61), Anti Terrorism Act is not attracted; that even section 395 PPC is not applicable, whereas other offences do not fall in Prohibitory Clause, hence petitioners are entitled to concession of bail.

6. Sardar Muhammad Latif Khosa, Senior Advocate Supreme Court further contended that no words can condemn the incident of 8th February, 2021, however Bar and the Bench are the two wheels of chariot and it is inconceivable that any practicing lawyer would commit such a gruesome act. It was further contended that it is only the rogue elements in the society, which may be involved in incident against the legal fraternity. It was further contended that lawyers in Islamabad were aggrieved of demolition of their chambers constructed around F-8 Katchehry and they approached the Chambers of Hon'ble Chief Justice to lodge their protest for appropriate action against the culprits. It was further submitted that it was never the intention of any practicing lawyer to commit any offence as has been alleged in the FIR.

7. Learned State Counsel *inter alia* contended that it is trite law that even if a person is not nominated in the FIR, he can still be responsible, if he has been found involved in the commission of offence. It was contended that as far as petitioner No.3 is concerned, since she is a woman and in the family way, hence State does not contest her

bail application. It was further submitted that in light of section 6(1) and 6(2) of Anti Terrorism Act, 1997, action of the persons involved, attracts the provisions of the Act of 1997. In so far as petitioner No.1 is concerned, learned State Counsel submitted that his Call Data Record shows that initially at about 10:00 a.m, he was at F-8 Katchehry and later on in the day, he was within the vicinity of G-10 Markaz, Islamabad. It was also contended that in accordance with statements under section 161 Cr.P.C. of the security personnel at the Chief Justice's Block namely Safdar Zaman, Constable, Tauqeer Abbas, Constable, Sajjad Ahmad, Constable as well as Muhammad Fayyaz, Constable, petitioner No.1 was leading the procession, who made charge at the Chambers of Hon'ble Chief Justice and took him hostage for a number of hours. Learned State Counsel further contended that since Constitutional Court remained dysfunctional for about entire day on 08.02.2021 and the Hon'ble Chief Justice along with other Judges were hostage, as they were not being allowed to leave the Chambers, this act amounts to the act of 'terrorism' within the meaning of the word as provided in section 6(1) read with 6(2)(m)(n) of 1997 Act. In support of contentions, learned counsel placed reliance on cases reported as 'Muhammad Shareef Vs. The State and Others' (2001 YLR 900), 'Rana Muhammad Arshad Vs. Muhammad Rafique

and Another' (PLD 2009 Supreme Court 427) and 'Gen. (R) Pervez Musharraf Vs. The State and Another' (PLD 2013 Islamabad 66).

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

9. Since petitioner No.3 is in the family way and her bail application is not contested by the State, hence her bail application was allowed through short order dated 01.03.2021.

10. In so far as petitioner No.1 is concerned, he is implicated for the offences mentioned hereinabove.

11. The thrust of the arguments by learned counsel for petitioner No.1 was that provisions of Anti Terrorism Act, 1997 (the Act) are not attracted in the facts and circumstances. In somewhat similar circumstances in 2007, when the Hon'ble Judges of the Superior Court were restricted from performing their duties by the then President/Chief Martial Law Administrator namely General (R) Pervez Musharraf and subsequently, he applied for bail before arrest, this Court in judgment reported as 'Gen. (R) Pervez Musharraf Vs. The State and Another' (PLD 2013 Islamabad 66), observed as follows:-

"7. Bare perusal of the F.I.R. clearly suggests that local police did not insert the sections which are made out, from the contents of F.I.R. Confining Hon'ble Judges of superior courts and to stop them from the performance of their duties is not an ordinary act, rather it is an act of "Terrorism" as defined by sections 6(1)(b) and 6(2)(b)(g) (i) (m) of Anti-Terrorism Act, 1997. For convenience above provisions are reproduced herein below:-

"6. (1)(b).---The use or threat is designed to coerce and intimidate or overawe the Government or the public or a section of the public or community or sect or create a sense of fear or insecurity in society; or

6. (2)(b).--- involves grievous violence against a person or grievous bodily injury or harm to a person;

(g) involves taking the law in own hand, award of any punishment by an organization, individual or group whatsoever, not recognized by the law, with a view to coerce, intimidate or terrorize public, individuals, groups, communities, Government officials and institutions, including Law Enforcement Agencies beyond the purview of the law of the land.

(i) creates a serious risk to safety of public or a section of the public, or is designed to frighten the general public and thereby prevent them from coming out and carrying on their lawful trade and daily business, and disrupts civil life".

From the above definition and contents of F.I.R., prima facie, offence under section 7 of Anti-Terrorism Act, 1997 is attracted, for which punishment may extend to imprisonment for life. Local police is bound under the law to insert the section which contents of F.I.R. suggest.

On court question, the I.O. of the case informed that petitioner did not join the investigation, rather a telephonic message was conveyed that material shall be provided before the court. This act of petitioner is defiance of the court order and misuse of the concession of bail".

12. Even-otherwise, the scheme of law as provided in the Anti Terrorism Act, was recently revisited by Hon'ble Supreme Court of Pakistan in case reported as 'Ghulam Hussain and others Vs. The State and others' (PLD 2020 Supreme Court 61). The Hon'ble Supreme Court of Pakistan, after discussing the entire case law on the subject as to the definition and scope of the word 'terrorism', observed as follows: -

“16. For what has been discussed above it is concluded and declared that for an action or threat of action to be accepted as terrorism within the meanings of section 6 of the Anti-Terrorism Act, 1997 the action must fall in subsection (2) of section 6 of the said Act and the use or threat of such action must be designed to achieve any of the objectives specified in clause (b) of subsection (1) of section 6 of that Act or the use or threat of such action must be to achieve any of the purposes mentioned in clause (c) of subsection (1) of section 6 of that Act. It is clarified that any action constituting an offence, howsoever grave, shocking, brutal, gruesome or horrifying, does not qualify to be termed as terrorism if it is not committed with the design or purpose specified or mentioned in clauses (b) or (c) of subsection (1) of section 6 of the said Act. It is further clarified that the actions specified in subsection (2) of section 6 of that Act do not qualify to be labeled or characterized as terrorism if such actions are taken in furtherance of personal enmity or private vendetta.

17. Before parting with this judgment we may observe that the definition of 'terrorism' contained in section 6 of the Anti-Terrorism Act, 1997 as it stands at present is too wide and the same includes so many actions, designs and purposes which have no nexus with the generally recognized concept of what terrorism is. Apart from that including some other heinous offences in the Preamble and the Third Schedule to that Act for trial of such offences by an Anti-Terrorism Court when such other offences do not qualify to be included in the definition of terrorism puts an extra and unnecessary burden on such courts and causes delay in trial of actual cases of terrorism. It is, therefore, recommended that the Parliament may consider substituting the present definition of 'terrorism' by a more succinct definition bringing it in line with the international perspectives of that offence and focusing on violent activities aimed at achieving political, ideological or religious objectives. We further recommend that the Parliament may also consider suitably amending the Preamble to the Act and removing all those offences from the Third Schedule to the Act which offences have no nexus with the offence of terrorism”

13. The instant case probably is the case of ‘first impression’, where members of legal profession have been implicated in an incident of attacking the High Court building and taking the Chief Justice of the High Court as hostage by confining him in his Chambers for a considerable number of hours and effectively making the constitutional body

namely Islamabad High Court dysfunctional for the entire day. Whether such act of the persons, responsible for above acts, falls in the definition of ‘terrorism’, needs to be examined through the provisions of Anti Terrorism Act, 1997. The relevant provisions, for the purposes of present controversy, are section 6 of the Act *ibid*. For ease of convenience, section 6 is reproduced below: -

“6. Terrorism.- (1) *In this Act, “terrorism” means the use or threat of action where:-*

- (a) the action falls within the meaning of sub-section (2); and*
 - (b) the use or threat is designed to coerce and intimidate or overawe the Government or the public or a section of the public or community or sect or a foreign government or population or an international organization or create a sense of fear or insecurity in society; or*
 - (c) the use or threat is made for the purpose of advancing a religious, sectarian or ethnic cause or intimidating and terrorizing the public, social sectors, media persons, business community or attacking the civilians, including damaging property by ransacking, looting, arson or by any other means, government officials, installations, security forces or law enforcement agencies: Provided that nothing herein contained shall apply to a democratic and religious rally or a peaceful demonstration in accordance with law.*
- (2) An “action” shall fall within the meaning of sub-section (1), if it:-*
- (a) involves the doing of anything that causes death;*
 - (b) involves grievous violence against a person or grievous bodily injury or harm to a person;*
 - (d) involves grievous damage to property including government premises, official installations, schools, hospitals, offices or any other public or private property including damaging property by ransacking, looting or arson or by any others means;*
 - (e) involves the doing of anything that is likely to cause death or endangers person’s life;*
 - (f) involves kidnapping for ransom, hostage-taking or hijacking;*
 - (ee) involves use of explosive by any device including bomb blast or having any explosive substance without any*

- lawful justification or having been unlawfully concerned with such explosive;*
- (g) incites hatred and contempt on religious, sectarian or ethnic basis to stir up violence or cause internal disturbance;*
 - (h) involves taking the law in own hand, award of any punishment by an organization, individual or group whatsoever, not recognized by the law, with a view to coerce, intimidate or terrorize public, individuals, groups, communities, government officials and institutions, including law enforcement agencies beyond the purview of the law of the land;*
 - (i) involves firing on religious congregation, mosques, imambargahs, churches, temples and all other places or worship, or random firing to spread panic, or involves any forcible takeover of mosques or other places of worship;*
 - (j) creates a serious risk to safety of the public or a section of the public, or is designed to frighten the general public and thereby prevent them from coming out and carrying on their lawful trade and daily business, and disrupts civic life;*
 - (k) involves the burning of vehicles or any other serious form of arson;*
 - (l) involves extortion of money ("bhatta") or property;*
 - (1) is designed to seriously interfere with or seriously disrupt a communication system or public utility service;*
 - (m) involves serious coercion or intimidation of a public servant in order to force him to discharge or to refrain from discharging his lawful duties;*
 - (n) involves serious violence against a member of the police force, armed forces, civil armed forces, or a public servant;*
 - (o) involves in acts as part of armed resistance by groups or individuals against law enforcement agencies; or*
 - (p) involves in dissemination, preaching ideas, teachings and beliefs as per own interpretation on FM stations or through any other means of communication without explicit approval of the government or its concerned departments.*
- (3) The use or threat of use of any action falling within sub-section (2) which involves the use of firearms, explosive or any other weapon is terrorism, whether or not sub-section (1) (c) is satisfied.*
- (3A) Notwithstanding anything contained in sub-section (1), an action in violation of a convention specified in the Fifth Schedule shall be an act of terrorism under this Act.*

(4) In this section "action" includes an act or a series of acts.

(5) In this Act, terrorism includes any act done for the benefit of a proscribed organization.

(6) A person who commits an offence under this section or any other provision of this Act, shall be guilty of an act of terrorism.

(7) In this Act, a "terrorist" means:-

(a) an individual who has committed an offence of terrorism under this Act, and is or has been concerned in the commission, preparation, facilitation, funding or instigation of acts of terrorism;

(b) an individual who is or has been, whether before or after the coming into force of this Act, concerned in the commission, preparation, facilitation, funding or instigation of acts of terrorism, shall also be included in the meaning given in clause (a) above".

The bare reading of section 6(1)(c) shows that under section 6(1)(a), "terrorism" means the use or threat of action where the action falls within the meaning of sub-section (2); subsection (2) provides that an action falls within the meaning of subsection (1), if it *inter alia* involves serious coercion or intimidation of a public servant in order to force him to discharge or to refrain from discharging his lawful duties or involves serious violence against a member of the police force, armed forces, civil armed forces, or a public servant. The words 'public servant' has been defined in section 2 of the Act and has the same meaning as in Section 21 of Pakistan Penal Code, 1860. The words "public servant" denotes a person falling under any of the descriptions herein after following; namely 'every judge'. Section 19 defines the word "Judge" denotes not only every person who is officially designated as a Judge, but also every person who is empowered by law to give, in any legal proceeding, civil or criminal, a

definitive judgment or a judgment which, if not appealed against, would be definitive, or a judgment which, if confirmed by some other authority, would be definitive, or who is one of a body of persons, which body of persons is empowered by law to give such judgment. The definition of the word 'public servant' as provided in PPC and applicable to Anti Terrorism Act, 1997 includes a 'judge' as 'public servant'. Sections 6(1) and 6(2) of the Act read with the definition of the word 'public servant' makes it clear that coercing or intimidating of a 'judge' from performing his duties, would tantamount to an act of 'terrorism'.

14. As noted above, on 08.02.2021, the Chief Justice of Islamabad High Court was confined to his Chambers by a group of lawyers and not allowed either to leave the referred room or even pass any order. The other Judges of the Islamabad High Court remained with him for quite a while and even Branches of the Court were closed down due to threat of intimidation and violence. Effectively, on 08.02.2021, which was a normal working day for a High Court, turned out to be a 'black spot' in the history of judiciary for Pakistan, as the Hon'ble Chief Justice and the Judges of the Islamabad High Court remained hostage and the Registry and Branches of the High Court were shut down from 11:30 onwards, hence a constitutional body remained dysfunctional and its administrative and judicial work held in abeyance. Due to act of lawyers, the litigants and the members of the public, for whom, this institution has been created for Islamabad Capital Territory to resolve

disputes and adjudicate the matters, suffered at the hands of few persons of legal profession. In such facts and circumstances, argument of learned counsel for the petitioners that provisions of Anti Terrorism Act, 1997 are not applicable, is not tenable.

15. Petitioner No.1 is seeking bail after arrest in the aforementioned FIR. The provision for bail after arrest in the Act of 1997 is section 21-D. The referred provision starts with non-obstante clause by excluding sections 439, 491, 496, 497, 498, 498-A and 561 Cr.P.C. The only courts, which have the jurisdiction to grant bail, are Anti-Terrorism Courts, High Courts or the Supreme Court of Pakistan. Under subsection (2) of section 21-B of the Act, all offences under 1997 Act, which are punishable with death or imprisonment exceeding three years, are non-bailable.

16. In light of above discussion of law and facts, since act of lawyers tantamount to an act of 'terrorism' in light of section 6(2)(m)(n), the relevant punishment prescribed under section 7 of Anti Terrorism Act, 1997, for such an act, is imprisonment for a period not less than five years but may extend to imprisonment of life and with fine [(section 7(1)(h) of the Act)], hence the provision attracted for the purposes of instant case, is punishment not less than five years and the offence is non-bailable.

17. The parameters, for grant of bail, are provided in section 21-D of the Act. Subsection (4), which includes the nature and seriousness of the offence, with which, the person is charged; the character, antecedents,

associations and community ties of the person; the time which the person has already spent in custody and the time which he is likely to spend in custody if he is not admitted to bail; and the strength of the evidence of his having committed the offence.

18. According to the record, petitioner No.1 initially was at F-8 Katchehry and then came to the High Court, which is duly shown in the Call Data Record. Moreover, the police officials, designated for the security of the Chief Justice Block, categorically stated in their statements under section 161 Cr.P.C. that petitioner No.1 led the charge. However, the petitioner is in judicial custody, as investigation to his extent, stands concluded; moreover, he is a senior Member of the Bar and was a candidate for election as President, Islamabad High Court Bar Association. Nothing is to be recovered from petitioner and his continued incarceration shall not serve any purpose.

19. The bail is a discretionary matter and the said discretion is to be exercised with caution and in accordance with law. The observations made in the cases in case titled 'Amjad Mustafa Malik Vs. D.G. NAB etc.' (W.P. No.769-2019) as well as 'Khawaja Salman Rafique and another Vs. National Accountability Bureau through Chairman and others' (PLD 2020 Supreme Court 456) are pertinent, as right to life and liberty is a fundamental right and arbitrary arrest or

threat to arrest can seriously hamper said fundamental right. Likewise, observations of august Apex Court in the celebrated judgment reported as 'Manzoor and 4-others Vs. The State' (PLD 1972 Supreme Court 81), are apt and applicable even today. The Hon'ble Supreme Court observed as follows:-

"It is important to remember that bail is not to be withheld as a punishment. There is no legal or moral compulsion to keep people in jail merely on the allegation that they have committed offences punishable with death or transportation, unless reasonable grounds appear to exist to disclose their complicity. The ultimate conviction and incarceration of a guilty person can repair the wrong caused by a mistaken relief of interim bail granted to him, but no satisfactory reparation can be offered to an innocent man for his unjustified incarceration at any stage of the case albeit his acquittal in the long run".

20. In view of above, instant application is allowed and petitioner No.1 namely Naveed Hayat Malik is enlarged on bail after arrest in the aforementioned case, subject to furnishing bail bond in the sum of Rs.50,000/- within one surety in the like amount to the satisfaction of learned trial court.

21. The above are the reasons for short order dated 01.03.2021 allowing concession of bail to petitioner No.3.

(MOHSIN AKHTAR KAYANI)

JUDGE

Announced in Open Court on _____

(AAMER FAROOQ)

JUDGE

JUDGE

JUDGE

Approved for Reporting

