

No: HCJD/C-121

ORDER SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
(JUDICIAL DEPARTMENT)

W.P. No.216/2021

Kanwal Shauzab
Versus
Learned Justice of Peace, etc.

S. No. of order/ proceedings	Date of order/ proceedings	Order with signature of Judge and that of parties or counsel where necessary.
	24-02-2022	Sardar Latif Khan Khosa, Sardar Shahbaz Latif Khosa, Mr Muhammad Usman Warraich, Mr Muhammad Sajid Tanoli, Mr Babar Hayat Samore, Mr Aftab Alam, Ms Imaan Zainab Hazir, Ms Suzain Jehan, Mr Shah Khawar, Mr Babar Hayat, mr Adil Aziz Qazi, Malik Abdul Rehman, Mr Asadullah, Mr Haseeb Hassan, Ms Zopash Khan, Mr Kashif H. Shah, Mr Abdul Rafay Siddiqui, Mr Murtaza Arif Khan, Mr Shehryar Khan, Mr Murtaza Arif Khan, Mr Sajid Ali Mangi, Mr Jaseem Ahmed Wafa Bhtto, Mr Amir Abbasi, Mr Muhammad Saqib Bhatti, Syed Sabee Ul Hassan Shah, Sardar Abdul Raziq Khan, Sar M. Musadiq, Advocates for petitioners. Mr Khalid Javed Khan, Attorney General for Pakistan. Mr Niaz Ullah Khan Niazi, Advocate General, ICT. Mr Qasim Wadud, Addl. Attorney General. Syed Muhammad Tayyab, Dy. Attorney General. Ms Kulsum Khaliq, State Counsel. Mr Imran Farooq, Asstt. Attorney General. Mr Tahir Hameed, State Counsel. Mr Adnan Haider Randhawa, amicus curiae. Mr Babur Bakht Qureshi, Director Cyber Crime, FIA. Mr Tanveer Mustafa, Addl. Director, Mr Qaiser Masood, Addl. Direcotr, Mr Riaz Janjau, Dy. Director, for FIA.

Athar Minallah, C.J.- The learned Attorney General has argued at length. He has suggested that the Federal Government may be given time to ensure safeguards against abuse of powers while dealing with complaints relating to the criminalized offence of defamation under section 20 of the Prevention of Electronic Crimes Act, 2016 (*hereinafter referred to as the "Act of 2016"*) as amended through the impugned Ordinance i.e. the Prevention of Electronic Crimes Act

(Amendment) Ordinance, 2022. He has informed that the Federal Government is considering making rules to regulate the power of arrest in relation to offences described under the Act of 2016. He has strenuously argued that criminalization of defamation nor amendments introduced through the impugned Ordinance are incompatible with the fundamental rights under Articles 19 and 19-A of the Constitution of the Islamic Republic of Pakistan, 1973 (*hereinafter referred to as the "**Constitution**"*).

2. The attention of the learned Attorney General was drawn to the pending cases and the rampant, widespread and unabated gross abuse of powers by the executing agency under the Act of 2016 i.e. the Federal Investigation Agency (*hereinafter referred to as the "**Agency**"*). He was informed that it has, prima facie, become obvious on the basis of the record before the Court that the gross abuse of powers vested in the Agency was restricted to alleged complaints of attacks on reputations of public office holders. The victims were critics, dissenters, political activists, human rights defenders, journalists and even a neighbor who had raised his dissent regarding damage caused to the environment at the behest of an elected public office holder.

3. It is noted that the Court has exercised restraint expecting that the Agency and the Federal Government would ensure safeguards against abuse of powers while dealing with complaints regarding offences under the Act of 2016. Regrettably, the gross abuse, having profound consequences in the context of the fundamental rights guaranteed under Articles 19 and 19-A of the Constitution, have continued unabated and that too in disregard to the Standard Operating Procedures (SOPs) submitted by the Agency not only before this Court but the august Supreme Court as well. While the matter was pending before the Court, the impugned Ordinance was promulgated in exercise of powers conferred under Article 89 of the Constitution.

4. A plain reading of the amendments made through the impugned Ordinance, and having regard to the conduct of the executive authorities as indicated above, it appears that, rather than exercising caution and taking effective measures against abuse of criminalized defamation, prima facie, oppressive amendments have been introduced. It, prima facie, appears that the likely effect of the amendments would be to discourage free speech. The chilling effect that has already been created through the rampant and widespread abuse of the offence of criminalized

defamation, seems to have been sanctioned through the repressive and draconian powers given to the Agency pursuant to the impugned Ordinance. Arrest or prison sentence in complaints relating to defamation has sufficient "chilling" effect to raise the question whether the threshold of "reasonable restriction" in the context of Articles 19 and 19-A of the Constitution has been met. Moreover, whether even unjustified attacks on the reputation of private individuals would outweigh compromising the right of free speech guaranteed under the aforementioned constitutional provisions. Arrest or imprisonment may be justified only in exceptional circumstances i.e. when there is serious impairment of fundamental rights i.e. in case of hate speech or incitement to violence but definitely not when it has a "chilling" effect likely to breach or discourage free speech in order to protect a private individual's reputation. It, therefore, prima facie, appears to the Court that criminalization of defamation under section 20 of the Act of 2016 and the impugned Ordinance do not satisfy the threshold of "reasonable restriction" and thus they are not compatible with the fundamental rights guaranteed under Articles 19 and 19-A of the Constitution nor the obligation of the State of Pakistan.

5. There is another crucial question regarding the constitutional validity of the impugned Ordinance. Public bodies do not enjoy protection of fundamental

rights guaranteed under the Constitution because they are bereft of the required status. Their existence is solely to serve the people and the test of their performance is confidence reposed in them by the actual stakeholders i.e. the people. Public bodies, therefore, do not require protection against attacks on their reputation. They cannot claim immunity from rigorous scrutiny and accountability by the people.

6. The vires of the impugned Ordinance also has to be justified on the touchstone of jurisdictional preconditions prescribed under Article 89 of the Constitution. It has to be justified that circumstances existed which rendered it necessary to take immediate action by exercising powers conferred under Article 89 and thus circumvent the legislative process within the exclusive jurisdiction of the Majlis-e-Shoora (Parliament). Would an unjustified circumvention not be a fraud upon the Constitution, particularly when it has the effect of violating one of the most important fundamental rights i.e. guaranteed under Article 19 of the Constitution.

7. The learned Attorney General is, therefore, expected to satisfy on the next date fixed, why the Court may not declare criminalization of defamation under section 20 of the Act of 2016 and the oppressive

amendments introduced through the impugned Ordinance, as “unreasonable restriction”, consequently incompatible with the fundamental rights guaranteed under Articles 19 and 19-A of the Constitution and thus ultra vires and liable to be struck down.

8. Relist on 10-03-2022. The direction given vide order, dated 23-02-2022 (in W.P. No.632/2022), regarding strict adherence to the SOPs submitted before this Court by the Agency shall continue till the next date fixed.

(CHIEF JUSTICE)