

Form No: HCJD/C-121.

JUDGEMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Crl. Appeal No. 25 of 2017

The State, through D.G. FIA, Islamabad

Vs

Shoaib Ahmed Shaikh and 26 others

DATE OF HEARING: 11-04-2018.

APPELLANT BY: Syed Hamid Ali Shah and Syed Ishfaq
Hussain Naqvi Advocates.
Raja Khalid Mehmood, Deputy Attorney
General.
Mr Gohal Ali Shah, SI/IO/FIA.

RESPONDENTS BY: Dr Babar Awan, Raja Rizwan Abbasi,
Haroon-ur-Rashid, Sohail Akhtar, Sher Afzal
Khan, Naila Noreen, Raaz Ali Shah, Imdad
Ali, Tajamul Hussain Advocates.

ATHAR MINALLAH, J.- Through this Appeal which
has been preferred under section 417 of the Criminal
Procedure Code, 1898 (hereinafter referred to as the
"***Cr.P.C.***") the State has assailed judgment, dated 31-10-
2016, passed by the learned Addl. Sessions Judge-IV, (West)

Islamabad. The learned trial Court, vide the impugned judgment, has acquitted the respondents No. 1 to 26.

2. The facts, in brief, are that respondent No. 1, namely Shoaib Ahmed Sheikh, is a Director and share holder in the juridical person established under the laws of Pakistan, namely, M/S Axact (Pvt.) Limited, Islamabad (hereinafter referred to as the "**Company**"). Pursuant to some articles published in foreign print media, the Federal Investigation Agency initiated an inquiry which ultimately led to the registration of a criminal case i.e F.I.R. No. 56/2015, dated 07-06-2015, at the Police Station FIA, Cyber Crime Circle, Islamabad (hereinafter referred to as the "**F.I.R.**"). The said criminal case was registered under sections 419, 420, 468, 471, 473, 109 and 34 of the Pakistan Penal Code, 1860 (hereinafter referred to as the "**PPC**"), read with sections 36 and 37 of the Electronic Transactions Ordinance, 2002 and section 4 of the Anti Money Laundering Act, 2010. After completing investigations, a report under section 173 of the Cr.P.C. was submitted before the learned trial Court on 07-07-2015, 21-09-2015 and 28-12-2015, respectively. The learned trial Court, after examining the report submitted under section 173 of the Cr.P.C, took cognizance by the framing of a charge on 11-03-2016. The prosecution evidence included the deposition of twenty three witnesses and producing several documents which were made part of the

record. The learned trial Court, after the recording of evidence and affording an opportunity of hearing to the parties, acquitted all the respondents/accused vide impugned judgment, dated 31-10-2016.

3. It would be pertinent to mention that, after the filing of the instant appeal, the Presiding Judge, namely, Pervaiz-Ul-Qadir Memon, Addl. District & Sessions Judge, who had conducted the trial and had rendered the impugned judgment, was proceeded against and ultimately dismissed from service vide Notification, dated 15-02-2018. The relevant portions of the said notification are as follows:

"WHEREAS, Mr. Pervaiz-Ul-Qadir Memon, AD&SJ [under suspension] was proceeded against under the Islamabad Judicial Service Rules, 2011 read with Punjab Judicial Service Rules, 1994 and Punjab Civil Servants [Efficiency & Discipline] Rules 1999, on the charges of corruption i.e. admission regarding illegal gratification to the tune of Rs.5 Million for acquittal of accused [Shoaib Ahmed Sheikh] through judgment dated 31-10-2016 in case titled as "The State Vs. Shoaib Ahmed Shaikh."

AND WHEREAS, ---

AND WHEREAS, ---

AND WHEREAS, ---

***NOW, THEREFORE,** the Hon'ble Chief Justice as Authority on taking into consideration the record and personal hearing afforded to him and having found the accused Officer being guilty of the above said charges, hereby order that **major penalty of removal from service** be imposed upon Mr. Pervaiz-UI-Qadir Memon, AD&SJ [under suspension], with immediate effect."*

4. Raja Khalid Mahmood, Deputy Attorney General and Syed Hamid Ali Shah ASC appeared on behalf of the State. They were heard at length. They had mainly argued that since the major penalty of removal from service had been imposed upon the Presiding Judge, namely Pervaiz-UI-Qadir Memon, for admitting his guilt regarding accepting illegal gratification which had led to the impugned judgment, therefore, the appeal on this sole ground was liable to be allowed. They, however, have unambiguously stated that the trial proceedings, from the framing of the charge till the conclusion of the evidence, did not suffer from any illegality or irregularity. They have also explicitly stated that the proceedings to the extent of recording of evidence were not tainted with bias. They have urged that the proceedings may, therefore, remain protected in case the matter is remanded

for decision afresh. They have placed reliance on the judgments rendered in the cases titled "Khairdi Khan and others v. the CROWN" [PLD 1953 FC 223], "Haji Muhammad Jalal v. Ijaz Ahmad Bajwa, Assistant director, FIA, State Bank Circle, Lahore, etc." [2000 UC 495], "Asif Ali Zardari and another v. The State" [PLD 2001 S.C. 568], "Aftab Shahban Mirani v. President of Pakistan and others" [1998 SCMR 1863], "Ms. Benazir Bhutto v. The President of Pakistan and another" [1992 SCMR 140], "Messrs MFMY Industries Ltd. and others v. Federation of Pakistan through Ministry of Commerce and others" [2015 SCMR 1550].

5. On the other hand, the learned counsels appearing for the respondents/accused, namely Dr Babar Awan, ASC, Raja Rizwan Abbasi, ASC, Haroon ur Rashid, ASC and Sohail Akhtar AHC were also heard at great length. It was their case that since the Presiding Judge who had conducted the trial and had rendered the impugned judgment has filed an appeal against Notification, dated 15-02-2018, therefore, the instant appeal be decided on merits. They have strongly denied that the respondents had given or made any attempt of giving illegal gratification to the Presiding Judge for procuring an order of acquittal. They have stressed that the proceedings against the respondents were initiated at the behest of other competitors of the Company. It is their case that the respondents were victims of unfounded propaganda and,

therefore, the remand of the instant matter to the learned trial Court for decision afresh would prejudice their rights. They have contended that unless it could be established beyond doubt that the respondents had been guilty of giving illegal gratification to the Presiding Judge, this factor must not be taken into consideration for deciding the instant appeal.

6. The learned Deputy Attorney General and the learned counsels have been heard and the record perused with their able assistance.

7. It is not denied that the Presiding Judge who had conducted the trial and thereafter had rendered the impugned judgment, dated 31-10-2016, was proceeded against and removed from service vide Notification, dated 15-02-2018, pursuant to the imposition of the major penalty by the competent authority. The relevant portions of the Notification, dated 15-02-2018, have been reproduced above. The disciplinary proceedings which had led to the imposition of the major penalty were regarding the allegation of accepting illegal gratification for the acquittal of the respondents in the case titled "The State v. Shoaib Ahmad Sheikh and others". The Presiding Judge had admitted his guilt and, therefore, the major penalty of removal from service was imposed upon him. There is no force in the argument raised by the learned counsels for the respondents/accused that the factor of

pecuniary interest of the Presiding Judge must not be taken into consideration unless the same stands established, particularly when he has preferred an appeal contesting his removal from service. The Notification, dated 15-02-2018, is in the field and, therefore, to the extent of the Presiding Judge who rendered the impugned judgment, his pecuniary interest in the instant case stands established. It would, therefore, be relevant to examine the case law in respect of bias of a Judge, particularly when pecuniary interest of the latter is involved.

8. The earliest judgment regarding the effect of trial by a Judge who is biased is that of the august Federal Court in the case titled "Khairdi Khan and others v. The CROWN" [PLD 1953 FC 223]. The said judgment was followed by a judgment rendered by a larger Bench of the august Federal Court in the case titled "Anwar and another v. The CROWN" [PLD 1955 FC 185] and the rule laid down in the earlier judgment of *Khairdi Khan's case, supra*, that bias vitiates all judgments and all orders made by a Judge as void was declared as incorrect and it was held that the said rule was not to form part of the law of Pakistan. The august Federal Court then summed up the conclusion as follows:

"(1) Every accused person has the right to a fair trial, namely, the right to be tried on the evidence by a judicially minded person."

(2) If the Judge is functioning under an influence brought about by his own act or by the act of another person, which has the effect of paralysing his judicial faculties, there is no fair trial.

(3) The fact that there was a paralysis of judicial faculties in a Judge cannot be proved by independent evidence but must appear from the manner in which he held the proceedings or arrived at his conclusions. Unless, therefore, it be shown that the proceedings held were not fair or impartial or that his conclusions were wrong, an allegation of paralysis of judicial faculties would be as much out of place as the allegation that the Judge was deaf when it appears from the record that he heard the evidence and prepared a true and faithful record of it.

(4) Bias in a Judge is the paralysis, complete or partial of judicial faculties and therefore the allegation of bias against a Judge would be wholly unfounded unless it be shown that the proceedings held by him were irregular and one-sided or the conclusions reached by him were wrong and reasons given in support thereof erroneous. In Khairdi Khan's case there being

no finding that the judgment of Mr. Ahmad Khan who held the second trial was wrong, it could not be held that he was a biased Judge. This Court's judgment in that case was restricted to showing that Mr. Ahmad Khan's findings were in conformity with the observations of Mr. Justice Kayani in the order of retrial, and the judgments of the learned Chief Justice and of Shahabuddin and Cornelius, JJ., expressly proceeded on the assumption that Mr. Ahmad Khan was influenced in his decision by the order of retrial and not on the finding that his judgment was in fact wrong. The learned Judges did make some observations to the effect that the view of evidence taken by Mr. Inayatullah Khan was not unreasonable but this cannot be said to amount to a finding that the judgment of Mr. Ahmad Khan which had been affirmed by a Division Bench of the High Court was wrong on the evidence adduced at the retrial. In the absence of any such findings no bias could have been attributed to Mr. Ahmad Khan.

(5) Bias in judicial matters may be caused by the judgment, order or observations of a superior Court or it may spring from personal, political, religious, communal, racial,

commercial or economic considerations. But whatever may be the cause of it, it can never be held to be proved in the case of a judge whose judgment is right because the fact that his decision was correct is a complete refutation of the allegation that his judicial faculties were paralysed. A biased judge producing a correct result is a contradiction in terms.

(6) The conclusion stated above must be read subject to one important exception, and that is that there is a species of bias which vitiates judicial proceedings irrespective of the correctness or otherwise of the result, but that is not because bias, whatever from it may assume, avoids the result of judicial proceedings, but because the Judge with that kind of bias is, on grounds of public policy, disqualified to be a Judge. Thus no Judge can be a Judge in his own cause, or in a case in which he is personally interested, not because his decision must invariably be in his own favour but on the principle that justice must not only be done but seen to be done, and however right the Judge deciding a cause in his own favour may be, neither the public nor the aggrieved party will be satisfied with the adjudication, and its result will

be vacated by the Court of appeal at the instance of the dissatisfied party. Instances of such bias are recognised in our law in section 556 of the Code of Criminal procedure, and will also be found in Dimes v. The Grand Junction Canal (No. 1) and others (1) and Rex v. Sussex Justices(2)."

9. In a subsequent judgment rendered in the case titled "Federation of Pakistan v. Muhammad Akram Shaikh" [PLD 1989 S.C. 689] a Bench consisting of twelve Hon'ble Judges of the august Supreme Court dealt with the question of 'bias of a Judge' in great detail and has, inter-alia, held as follows:

"The principle that emerges from various judgments and treatises referred to by my learned brother, some of which have been quoted above is that where the pecuniary or financial interest of a Judge, no matter however small, is likely to be affected as a direct result of the decision in any case, he is ipso facto disqualified from hearing it, and has no option left but to decline to sit on the Bench deciding it."

The august Supreme Court, in the above judgment, has explicitly held that any direct pecuniary interest,

however small, in the subject of inquiry disqualifies a person from acting as a Judge in the matter.

10. The above principles and law were reaffirmed by a full Bench of the august Supreme Court, consisting of seven Hon'ble Judges in the case titled "Asif Ali Zardari and another v. The State" [PLD 2001 S.C. 568]. It was, inter-alia, observed and held as follows:

"Bias is said to be of three different kinds:--

a) A Judge may have a bias in the subject-matter which means that he is himself a party or has direct connection with the litigation, so as to constitute a legal interest.

A 'legal interest' means that the Judge is 'in such a position that a bias must be assumed'.

b) Pecuniary interest in the cause, however, slight, will disqualify the Judge, even though it is not proved that the decision has in fact been affected by reason of such interest. For this reason, where a person having such interest sits as one of the Judges the decision is vitiated.

c) A Judge may have a personal bias towards a party owing to relationship and the like or he may be personally hostile to a party as a result of events happening either before or during the trial. Whenever there is any allegation of personal bias,

the question which should be satisfied is—"is there in the mind of the litigant a reasonable apprehension that he would not get a fair trial?"
The test is whether there is a 'real likelihood of prejudice', but it does not require certainty. 'Real likelihood' is the apprehension of a reasonable man apprised of the facts and not the suspicion of fools or 'capricious persons'. (Emphasis provided)."

In the above judgment the august Supreme Court reiterated the law enunciated in the case titled "Ms. Benazir Bhutto v. President of Pakistan and another" [1992 SCMR 140] to the effect that a Judge having pecuniary or proprietary interest or other personal interest in the subject matter of a case before him cannot adjudicate the same.

11. The august Supreme Court, in the case titled "Government of N.W.F.P. through Chief Secretary and another v. Dr. Hussain Ahmad Haroon and others" [2003 SCMR 104], has quoted with approval principles enunciated in the judgments rendered by Courts outside Pakistan and the same are as follows:

"There is no doubt that any direct pecuniary interest, however, small in the

subject of inquiry does disqualify a person from acting as a Judge in the matter.” Blackburn, J. In R v. Rand (1986) LR 1 WB 230, 232.

“If he has any legal interest in the decision of the question one way he is disqualified no matter how small the interest may be.” Lush, J. in Serjeant v. Dale (1877) 2 QBD 558, 567.

“.....the least pecuniary interest in the subject-matter of the litigation will disqualify any person from acting as a Judge.” Stephen, J. in R v. Farrant (1887) 20 ADB 58, 60.

“.... A person who has a judicial duty to perform disqualifies himself from performing it if he has a pecuniary interest in the decision which he is about to give or a bias which renders him otherwise than an impartial Judge. If he has a pecuniary interest in the success of the accusation he must not a Judge.” Bown, L.J.in Lesson v. General of Medical Education. (1989) 43 Ch. D 366, 384.”

It is to be judged whether a reasonable person in the similar situation would assume the

possibility of bias in the mind of the deciding officer.”

12. It is obvious from the above discussed precedent law that the slightest pecuniary interest of a Judge disqualifies the latter and, depending on the facts and circumstances in each case, any kind of bias vitiates the proceedings or the decision as the case may be. In the instant case the Presiding Judge was proceeded against and the major penalty of removal from service was imposed upon him vide Notification, dated 15-02-2018, on the allegation of accepting illegal gratification in the case at hand.

13. The learned Deputy Attorney General and the learned counsels who have appeared on behalf of the State have unambiguously stated that the prosecution has no reservations regarding the proceedings till conclusion of evidence. The prosecution has expressly made a request for protecting the recorded evidence.

14. For what has been discussed above, we declare that the impugned judgment is vitiated on the sole ground of the pecuniary interest of the Presiding Judge against whom the charge of accepting illegal gratification stands established. We, therefore, allow

the appeal and consequently set aside the impugned judgment, dated 31-10-2016. The respondents/accused shall surrender before the learned Sessions Judge, (West) Islamabad in the light of the law laid down by the august Supreme Court in the case titled "Muhammad Adnan alias DANA v. State" [2015 SCMR 1570]. The learned Sessions Judge, (West) Islamabad is expected to afford an opportunity of hearing to the parties and thereafter decide the matter afresh. It is obvious from the impugned judgment, dated 31-10-2016, that the respondents were on bail and that their bail bonds were cancelled and sureties discharged. The respondents, therefore, shall remain on bail and furnish fresh sureties to the satisfaction of the learned Sessions Judge, (West) Islamabad.

(MIANGUL HASSAN AURANGZEB)	(ATHAR MINALLAH)
JUDGE	JUDGE

Announced in open Court, on 25th April, 2018.

JUDGE

JUDGE

Approved for reporting.