

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

{Criminal Misc. No.162/T/2017}

Noor Ejaz Chaudhry & others
Vs
Maheen Zafar & others

Petitioners by:	Mr. Shabbir Hussain, Advocate.
Respondents by:	Sardar Taimoor Aslam, Advocate for respondent No.2. M/s Raja Rizwan Abbasi & Sohail Akhtar Advocates for respondent No.3. M. Ilyas Siddiqui on behalf of parents/child. Mian Abdul Rauf, Advocate General, Islamabad. Ch. M. Siddique Superintended, Sessions Court, West, Islamabad. Mr. Khalid Mehmood Awan, SHO, P.S, Industrial Area, Islamabad. Mr. Arshad, SI.
Date of hearing:	17.3.2017

AAMER FAROOQ, J. This judgement shall decide the instant transfer proceedings and Criminal Miscellaneous No.163/T/2017 as common questions of law and facts are involved.

2. The facts relevant for the purposes of the instant proceedings are that on 29.12.2016 a minor child aged about 9 to 10 years was recovered from the house of Maheen Zafar and Raja Khurram Ali Khan (Respondents No.2 & 3 in Criminal Miscellaneous No.163/T/2017). The said recovery was based on pictures of a battered child (Tayyba) which were in circulation on social media. Subsequently, on the statement of the referred

minor child an FIR was lodged bearing No.483 dated 29.12.2016 under sections 342/506/34 PPC at Police Station Industrial Area, Islamabad. The minor child was produced before Assistant Commissioner Potohar, Islamabad, who recorded her statement; in the statement she stated that she was regularly abused and tortured by respondent No.2. On the same date i.e. 29.12.2016, the victim was produced before Chief Medical Officer at Pakistan Institute of Medical Sciences (PIMS), Islamabad for treatment and Medico Legal Opinion (MLO). The custody of the child was entrusted to Crisis Center at Benazir Bhutto Shaheed Human Rights Center for Women Sector H-8, Islamabad. On 30.12.2016, the Medical Legal Report (MLR) was received which opined that nature of injuries constituted offences under sections 337-A (i) and 337-F (ii) PPC which were then added to the F.I.R already lodged. On 02.01.2017, respondents No.2 & 3 appeared before Additional Sessions Judge, West Islamabad for bail before arrest which was confirmed. On 03.01.2017 an application was filed on behalf of the parents of the victim under section 491 Cr.P.C for recovery of child from the Crisis Center. The custody of the child was handed over to her parents on the basis of a compromise between the parties i.e. respondents No.2 & 3 and the parents of the child. On 04.01.2017, the Hon'ble Supreme Court of Pakistan took Suo Moto notice about the entire incident and initiated proceedings in Human Rights Case No.63/2017. Petitioners in Criminal Miscellaneous No.163/T/2017 also filed a petition (C.P No.01/2017) before Hon'ble Supreme Court. On the orders of the Hon'ble Supreme Court a Medical Board was constituted which rendered its report dated 09.01.2017 and

concluded in the same that the wounds on back and on her left hand are most probably due to contact burns. The hand wound is full thickness skin loss and healing while wounds over back are almost healed. On 08.03.2017, August Apex Court in the aforementioned proceedings referred the matter to this Court to consider whether the case titled "*State Vs. Maheen Zafar*" pending before Syed Haider Ali Shah, Judicial Magistrate, 1st Class, Islamabad (West) should be transferred to its own jurisdiction pursuant to powers under section 526 of the Cr.P.C on its own initiative. On receiving the direction from the August Apex Court, on 15.3.2017 this Court issued notice to all the concerned parties. On the same date an application was filed (Criminal Miscellaneous 163/T/2017) by Noor Ejaz Chaudhry and others who are Human Rights Activists and are also involved in the proceedings before the August Apex Court seeking transfer of the above mentioned case/trial to this Court.

3. The learned counsel for the petitioners in Criminal Miscellaneous No.163/T/2017, *inter-alia*, contended that the trial of respondents No.2 and 3 is pending before a Judicial Magistrate, Islamabad who is subordinate to respondent No.3 i.e. Raja Khurram Ali Khan, Additional District & Sessions Judge Islamabad, therefore, there is little or no chance of fair trial in the matter. It was further contended that the victim is about 10 years old child and her parents are not of means therefore; it is likely that respondents No.2 and 3 can influence the trial by maneuvering the evidence and pressurizing the parents of the victim; that this Court has parental jurisdiction which can be exercised on an application of a party interested or on its own

initiative; that case is of sensitive nature involving torture to a minor child. It was further submitted that since respondent No.3 is a serving Additional District & Sessions Judge in Islamabad, therefore, there is propriety of interest and reasonable apprehension that a fair trial is not possible. In support of his contentions, the learned counsel placed reliance on case reported as "Muhammad Nawaz Vs. Ghulam Kadir & 3 others {PLD 1973 SC 327}.

4. The learned counsel for respondent No.3/Raja Khurram Ali Khan, Additional District & Sessions Judge, Islamabad, *inter-alia*, contended that offences in question are bailable, therefore bail before arrest was filed before the Court of competent jurisdiction and the same was allowed without any undue haste. It was further contended that the offences levelled in the F.I.R are bailable and are non-cognizable; that even statement recorded under section 164 Cr.P.C is not in accordance with law. The learned counsel further pointed out that the petition under section 491 Cr.P.C was decided without any undue haste and in accordance with law by the Court of competent jurisdiction; that none of the grounds mentioned in Section 526 Cr.P.C are attracted in the facts and circumstances of the case; that in case, the trial in the matter is transferred to this Court, the respondents shall lose valuable rights of filing appeals inasmuch as in case of any judgement/order against them the only recourse available to them would be before the Hon'ble Supreme Court of Pakistan. It was further contended that the transfer application (Criminal Miscellaneous No.163/T/2017) is not maintainable as the petitioners are not a

party interested as provided under section 526 Cr.P.C. It was further contended that the instant matter is an ordinary occurrence; however things are being controlled by media and an unnecessary hype has been created.

5. The learned counsel for Mst. Maheen Zafar/respondent No.2, *inter-alia*, contended that the transfer application i.e. Criminal Miscellaneous No.163/T/2017 is not maintainable as the petitioners have no *locus standi* in the matter. In support of his contentions, the learned counsel placed reliance on case titled as "Surray Begum Vs. The State & another" {PLD 1996 Lahore 189}. It was further contended that there is no actual evidence of impartiality and it is perceived that same is the case and even the trial has not yet commenced. It was also contended that in suchlike circumstances there is no justification or basis for transfer of the trial to this Court. The learned counsel in support of his contentions placed reliance on case reported as "Rahim Bakhsh Vs. Khalil-ur-Rehman" {PLD 1971 Lahore 517} reliance was also placed on cases titled as "Khuda Bukhsh Vs. State {1997 SCMR 1383} and "Muhammad Ashraf & others Vs. The State {1990 PCr.LJ 1359, "Amir Atlas Khan & another Vs. The State & 2 others {2002 SCMR 709} and "Haji Khawar Saleem Vs. The State" {2001 SCMR 905}.

6. The learned counsel for the parents of the victim, *inter-alia*, contended that apprehension that the trial would not be fair is not real, but is manufactured. It was further contended that till to date no illegality has been committed either in investigation or conduct of the case; that in case, the trial is transferred, the respondents/accused shall lose remedies of

appeal; that the statement under section 164 Cr.P.C was not in accordance with law; that the petitioners in Criminal Miscellaneous No.163/T/2017 do not have any *locus standi* in the matter; that this Court though can transfer a case on its own initiative, but the same discretion is to be exercised on the basis of whatever is made to appear to this Court and in the instant case there is nothing on record which shows that such discretion is to be exercised.

7. The learned Advocate General, Islamabad, *inter-alia*, contended that under Article 4 of the Constitution to enjoy protection of law and to be treated in accordance with law is inalienable right of every citizen. Similarly under Article 9 no person is to be deprived of life or liberty save in accordance with law and under Article 10-A of the Constitution for determination of any criminal charge against him a person shall be entitled to a fair trial and due process. It was further contended that the relevant provisions in the instant case are Section 526 (1) (a) (e) Cr.P.C which provide that whenever this Court feels that a fair and impartial inquiry or trial cannot be held in any Criminal Court subordinate thereto or that such order is expedient for the ends of justice or is required by any provision of the Criminal Procedure Code it may order transfer of a case. In this behalf, it was submitted that the particulars of phrase "made to appear" are open-ended and relate to any particular situation or document. The learned Advocate General, Islamabad submitted that under Volume-3 Chapter 26 of Lahore High Court Rules and Orders the High Court has power to order transfer of a case in

different situations and circumstances; in particular under Clause 8, where Magistrate is connected with accused.

8. Arguments on behalf of learned counsels for the parties have been heard and documents placed on record have been perused with their able assistance.

9. This Court has the power to transfer any Criminal case pending before any Court subordinate to it to any other Court or to itself under section 526 of Cr.P.C. For the ease of convenience, the relevant sub-sections of Section 526 *ibid* are reproduced below:-

1) Whenever it is made to appear to the High Court:

a) that a fair and impartial inquiry or trial cannot be had in any Criminal Court subordinate thereto, or

b) that some question of law of unusual difficulty is likely to arise, or

c) that a view of the place in or near which any offence has been committed may be required for the satisfactory inquiry into or trial of this same, or

d) that an order under this section will tend to the general convenience of the parties or witnesses, or

e) that such an order is expedient for the ends of justice, or is required by any provision of this Code; it may order;

- (i) that any offence be inquired into or tried by any Court not empowered under section 177 to 184 (both inclusive) but in other respects competent to inquire into or try such offence;*
 - (ii) that any particular case or appeal, or class of cases or appeals, be transferred from a Criminal Court subordinate to its authority to any other such Criminal Court of equal or superior jurisdiction;*
 - iii) that any particular case or appeal be transferred to and tried before itself; or*
 - iv) that an accused person be [sent] for trial to itself or to a Court of Session.*
- (2) When the High Court withdraws for trial before itself any case from any Court [...] it shall observe in such trial the same procedure which that Court would have observed if the case had not been so withdrawn.*
- (3) The High Court may act either on the report of the Lower Court, or the application of a party interested, or on its own initiative.*
- (4) Every application for the exercise of the power conferred by this section shall be made by motion, which shall, except when the applicant is the Advocate-General, be supported by affidavit or affirmation.*

(5) When an accused person makes an application under this section the High Court may direct him to execute a bond, with or without sureties, conditioned that he will, if so ordered, pay any amount which the High Court may under this section award by way of compensation to the person opposing the application.

Sub-section 1 of Section 526 Cr.P.C provides the grounds on which the transfer order can be passed as well as the powers/discretion which may be exercised by this Court. Under sub-section 3 *ibid* the power may be exercised in three (03) eventualities i.e. on report of the lower Court; on application of a party interested or on its own initiative. In the present case, there is no report of the Lower Court, therefore the same is not applicable, however, an application has been made by Human Rights Activists seeking transfer of the case and the matter has been referred to this Court by the August Apex Court to examine whether the facts and circumstances of the case warrant transfer of aforementioned proceedings to this Court on its own initiative.

10. In so far as, Criminal Miscellaneous No.163/T/2017 is concerned, the same has been filed by Human Rights Activists seeking transfer of the case on the ground that fair and impartial trial cannot take place and that transfer is expedient for the ends of justice. The learned counsels for respondents No.2 & 3 as well as the learned counsel for parents of the victim have objected to the maintainability of the application on the ground that the petitioners are not a party interested hence have no *locus standi* in the matter. In this regards in case reported as "Kanchan Ali

Vs. Shah Jahan & others” {PLD 1962 Dacca 192}, it was held that under certain circumstances a person injured or aggrieved by the crime or a witness in the trial, an informant or a complainant on whose information the machinery of law is set in motion might under certain circumstances come within the description of any party interested within the meaning of Section 526 (3) (8) of Criminal Procedure Code. It was further observed that the category stated above is by no means exhaustive. In case titled as “Surraya Begum Vs. The State & another” {PLD 1996 Lahore 189} it was held that where a transfer application had neither been moved by the State nor by the complainant or any of the prosecution witnesses nor any ground was shown for transfer of the case on Court’s own initiative; such a petitioner had no *locus standi* to seek transfer of the case. In case titled as “Brahmdutt Vs State” {AIR (37) 1950 Allahabad 483} it was held that a third person has no right to object to the transfer of a case. He may in certain circumstances be considered to be interested party; however, even then, his objection to the transfer of the case will not get precedence over the desires of the two main parties to the case namely the accused and State. In case titled as “Muhammad Khan & another Vs. The State & another” {PLD 1962 (WP) Karachi 864} it was observed that person lodging First Information Report and moving machinery of police and Criminal Courts is entitled to make a transfer application in certain circumstances while holding so reliance was placed on case titled “Sardar Shah Vs. Gurdit Singh {AIR 1934 Lahore 612}”.

11. In view of the above case law which elucidates the concept of the interested party as appearing in Section 526 Cr.P.C the petitioners/applicants who are Human Rights Activists cannot be regarded as interested party for the purpose of Section 526 Cr.P.C.

12. The August Apex Court has referred the matter to this Court for deciding whether the trial in the matter titled as "*State Vs. Maheen Zafar*" is to be conducted by the Judicial Magistrate, Islamabad or this Court in the facts and circumstances of the case. Before advertng to law applicable in the case it is proper to note some material facts. One of the accused Raja Khurram Ali Khan is a serving Additional District & Sessions Judge, Islamabad and the other accused is his wife. The victim is a minor child aged about 9 to 10 years and her parents are of no means. One of the allegations against the accused is that they had paid a lump sum amount to the parents of the victim and kept her as a maid for doing domestic odd jobs. The victim was recovered from the respondents/accused under peculiar circumstances on the basis of pictures in circulation, of her battered condition, on social media. A number of Human Rights Activists and Organizations on coming to know of the matter have become active demanding due punishment to the culprits. The mater currently is pending before Syed Haider Ali Shah, Judicial Magistrate, Islamabad, (West) who is subordinate to Raja Khurram Ali Khan. Two learned Additional Sessions Judges, Islamabad, who allowed bail before arrest to the accused and ordered recovery of the child from the Crisis

Center were asked to submit reports to the August Apex Court for apparently helping their colleague.

13. Under section 526 Cr.P.C whenever it is made to appear to this Court that a fair and impartial inquiry or trial cannot be held in any criminal court subordinate thereto or where transfer order is expedient for the ends of justice this Court may order that any particular case or appeal be transferred to and tried before it. This power/discretion can be exercised by this Court on inter-alia its own initiative. The seminal judgment of the August Apex Court interpreting Section 526 Cr.P.C is "Muhammad Nawaz Vs. Ghulam Kadir & 3 others {PLD 1973 SC 327}. In the referred judgement it was held as follows:-

The transfer of a criminal case from a Court of competent Court of competent jurisdiction is justified only if there is a reasonable apprehension in the mind of the party concerned that the Court would not be able to act fairly and impartially in the matter. It is of paramount importance that parties arraigned before Courts should have confidence in their impartiality. It is one of the important duties of a High Court to create and maintain such confidence, and this can be done only by ensuring that, so far as practicable, a party will not be forced to undergo a trial by a Judge or Magistrate whom he reasonably regards as being prejudiced against him. 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.

The ratio of decidendi of the above mentioned case is that there should be a reasonable apprehension that fair and impartial inquiry or trial is not possible in the facts and circumstances of the case and test of reasonableness of the apprehension must be that it should be such as a reasonable man might justifiably be expected to have. In case titled as "Zulfiqar Ali Bhutto Vs. The State" {PLD 1979 SC 53} the Hon'ble Supreme Court held that under section 526 (3) Cr.P.C High Courts are authorized to transfer on its own initiative a criminal case from one subordinate Court to another or to itself in its administrative capacity requiring no notice to the parties. In case titled as "Abdul Huq alias Abdul Huq Munshi & others Vs. Abdul Matleb" {PLD 1967 Dacca 305} it was observed as follows:-

"A plain reading of section 526 of the Code of Criminal Procedure, 1898 shows that the High Court may order the transfer of a case from one Court to another Court of equal or superior jurisdiction provided that it is made to appear to it that a fair or impartial inquiry or trial cannot be had in any Criminal Court subordinate thereto. The section does not make it necessary that there should be a reasonable apprehension in the mind of the accused that he will not get a fair and impartial inquiry or trial. It is enough if it appears from circumstances placed before the High Court that a fair and impartial inquiry or trial cannot be had in any Court. The result is that the High Court may transfer a case from one Court to another if it is made to appear to it that the accused cannot have a fair or impartial inquiry or trial in any Court and also where circumstances have so transpired as to lead the accused to entertain a reasonable oppressions that he may not have a fair trial. Fulfillment of either of these conditions is enough for ordering transfer of a case from one Court to another. This is in consonance with the principle that justice should not only be done but should appear to be done. It is not necessary that bias of the Magistrate must be proved to justify a transfer. What is necessary is to see whether circumstances exist, be those of bias or otherwise, as to justify the apprehension of the accused so as to

bring the same to that standard of "reasonable apprehension".

In case titled as "Zulfiqar Ali Bhutto Vs. State" {1978 PCr.LJ 332} the larger bench of Hon'ble Lahore High Court held that under section 526 Cr.P.C a case can be transferred on the basis of bias inasmuch as it is a fundamental principle that no man can be a judge in his own cause or where a judge has slightest pecuniary or propriety interest in the subject matter of the proceedings then there is a real likelihood of bias. Under Chapter 26 Volume-3 of Lahore Court Rules & Orders (which are also applicable to this Court); High Court has power to transfer any case from one Court subordinate to it to another on any of the grounds specified in Section 526 Cr.P.C. In this regard, under Rule-8 of Chapter 26 *ibid*, in case where the judge or Magistrate happens to be connected with one or the other party by relationship, friendship etc; it is advisable for him to move proper authority for transfer of the case to some other Court; for howsoever straight forward and impartial he may be there is always the danger of his actions being regarded with suspicion and misinterpreted; similar grounds for transfer exist in Rule 6 (b) i.e. where a Judge or Magistrate is connected with one or the other party to the case by relationship, friendship etc and is therefore likely to be partial.

14. In view of the above case law; Rules and Orders of Lahore High Court and facts and circumstances of the case it is unlikely that an impartial or fair trial is possible before Syed Haider Ali Shah, Judicial Magistrate, Islamabad (West) in the

matter "*The State Vs. Maheen Zafar and others*", due to the reason, as mentioned above, that one of the accused is a serving Additional District & Sessions Judge, Islamabad and the learned Judicial Magistrate seized of the matter is subordinate to him, therefore is connected to him. It is an adage that justice is not only to be done, but should also seem to be done. Moreover, in {PLD 1967 Dacca 305} supra it was observed that the actual bias of the Magistrate need not be proved and same is the position under the High Court's Rules and Orders wherein it is provided that where by virtue of his connection with the accused it is likely that Magistrate or a Judge might be partial the matter should be transferred. On the basis of above facts a fair trial of the accused is not possible and it is expedient for the ends of justice that the same should be conducted by this Court. The contention of the learned counsels for respondents No.2 and 3 that in case the matter is transferred to this Court they shall lose right of appeal is not right as under section 411-A Cr.P.C where trial is conducted by High Court appeal lies to the same Court.

15. For the reasons set out above, Criminal Miscellaneous No.163/T/2017 is dismissed as the petitioners have no *locus standi* in the matter as they are not interested party within meaning of the words as provided in Section 526 Cr.P.C. The transfer application Criminal Miscellaneous No.162/T/2017 is allowed with the direction that the case *State Vs. Maheen Zafar and others* is transferred from the Court of Syed Haider Ali Shah, Judicial Magistrate, Islamabad (West) and

shall be tried by this Court. Office is directed to do the needful in this behalf.

(AAMER FAROOQ)
JUDGE

Announced in Open Court on 24.3.2017

JUDGE

Approved for Reporting

Niqab M

Uploaded By: Zulqarnain Shah