

JUDGMENT SHEET
ISLAMABAD HIGH COURT, ISLAMABAD,
JUDICIAL DEPARTMENT

W.P. No.1159/2017

Haroon Rashid & another

versus

FOP through Secretary, Ministry of Interior & others

Petitioners by: Mr. Idrees Ashraf, Advocate.

Respondents by: Barrister M. Mumtaz Ali, AAG.

Muhammad Abubakar Naeem, RDM
Branch, D.C. Office, ICT, Islamabad.

Adeel Ahmad Sheikh, S.I., AHTC,
Islamabad.

Date of Hearing: 08.04.2019.

MOHSIN AKHTAR KAYANI, J: Through this writ petition, the petitioners sought order of this Court in favour of Talha Haroon, petitioner No.2, to be discharged from the proceedings of extradition.

2. Brief facts referred in the instant writ petition are that Haroon Rashid/petitioner No.1 argued that his son namely Talha Haroon/petitioner No.2 is USA passport holder and when he visited his hometown in Quetta, Pakistan, he has been alleged to conspire with other residents of USA to commit terrorism activity in USA, whereafter the matter was referred to District Magistrate, Islamabad and Additional District Magistrate was assigned to conduct inquiry, who submitted his inquiry report under Section 13 of the Extradition Act, 1972 to the Federal Government on 15.01.2017 with the recommendation that petitioner No.2/accused may be extradited. Hence, the instant writ petition.

3. Learned counsel for the petitioner No.1 contends that petitioner No.1 has assailed the order of inquiry against his son Talha Haroon/petitioner No.2 passed by Inquiry Magistrate under Extradition Act, 1972; that Talha Haroon/petitioner No.2 is decedent of Pakistan, but holds USA Passport and was living in Quetta (Pakistan); that Talha Haroon/petitioner No.2 has falsely been implicated with other to conspire in USA and committing any offence on USA soil; that alleged offence of conspiracy of terrorism by Talha Haroon/petitioner No.2 is not referred in Extradition Act, 1972 and even no concrete evidence has been brought on record through which it can be presumed that Talha Haroon/petitioner No.2 has conspired in the alleged offence, even no material has been brought on record, except warrant of arrest and statements in affidavit given by the I.O, which have no evidentiary value unless deponent appears before the Magistrate; that the entire record is based upon undercover agent, who tried to communicate with Talha Haroon/petitioner No.2 and other co-conspirator CC1, but the material through which they have communicated has not yet been identified nor placed on record even at the time of arrest of Talha Haroon/petitioner No.2; that the laptop and mobile phone were neither sealed nor referred for the purpose of recovery of any data, through which it can be assumed that Talha Haroon/petitioner No.2 ever communicated with undercover agent or co-conspirator CC1; that Talha Haroon/petitioner No.2 is still in Quetta (Pakistan) and never been to USA for the last 10 years.

4. Conversely, learned AAG under the instructions of FIA officials contends that there is overwhelming evidence against Talha

Haroon/petitioner No.2, which links him with the case of alleged terrorism on the soil of USA as he has planned to use weapon of mass destruction in USA Service System as well as in concert held in New York with co-conspirator CC1; that co-conspirator CCI was taken into custody when he moved from Canada, who was managing the explosive materials to implement the plan; that co-conspirator Abdul Rehman El Rahnasawy was convicted and sentenced by the USA Court to 40 years imprisonment for plotting to carry out terrorist attack in New York City in September, 2016; that the said notification is news published by the Justice Department dated 19.12.2018; that two of the conspirators namely Talha Haroon and Salik were arrested in Pakistan and in Philippine in 2015, respectively, whereas the latter is also under process of extradition; that there is no requirement provided under the law to produce the entire evidence or witnesses before the Inquiry Magistrate for extradition of any offender, rather the Inquiry Magistrate is under obligation to inquire as to whether the offender is linked with the alleged offence and *prima facie* view has to be given for which inquiry, investigation or trial is pending in any foreign State; that word "terrorism" has not been used in the Extradition Act, 1972 but conspiracy of murder is referred in the schedule, which covers all kind of terrorism related offence as it results into death of individuals in the foreign State.

5. I have heard the arguments advanced by learned counsel for petitioners as well as learned Assistant Attorney General and perused the record with their able assistance.

6. The perusal of record reveals that the Ministry of Interior Government of Pakistan issued a letter, whereby request of Government of USA was received for extradition of Talha Haroon/petitioner No.2, who was allegedly involved in case of terrorism. The Federal Government in response to said request ordered Magisterial Inquiry U/S 7 of the Extradition Act, 1972 and Mr. Abdul Sattar Essani, Additional Deputy Commissioner (G) Islamabad was nominated to hold the inquiry vide letter dated 03.11.2016/Exh.P.A, which contains orders of Federal Government of the same date Exh.P.B, Exh.P.C, Exh.P.D, Exh.P.E and Exh.P.F. The request which has been placed before the Inquiry Magistrate contains the following documents.

1. *Exh.PG. A certificate issued by Assistant Authentication Officer, Department of State United States of America.*
2. *Exh.PG-1. Letter issued by Attorney General United States Department of Justice.*
3. *Exh.PG-2. Certification by Jeffrey M. Olson, Associate Director, Officer of International Affairs Criminal Division Department of Justice United State of America.*
4. *Exh.PG-3 to Exh.PG.13. Affidavit of Assistant United States Attorney.*
5. *Exh.PG-14 to Exh.PG35. Certified copy of complaint.*
6. *Exh.PG-36. Arrest warrant of Talha Haroon.*
7. *Exh.PG-37 & Exh.PG-38. Title 18, United States Code, Section 2332a/Use of weapons of mass destruction.*
8. *Exh.PG-39 & Exh.PG-40. Title, 18, United States Code, Section 2332b/Acts of terrorism transcending national boundaries.*
9. *Exh.PG-41 & Exh.PG-42. Title 18, United States code, Section 2332f/Bombings of places of public use, government facilities, public transportation systems and infrastructure facilities.*
10. *Exh.PG-43. Title 18, United States Code, Section 2339A/providing material support to terrorists.*

11. *Exh.PG-44. Title 18, United States Code, Section 2339B/Providing material support or resources to designated foreign terrorist organizations.*
 12. *Exh.PG-45. Title 8, United States code, Section 1182(a)(3)(B)/Definition of 'terrorist activity'*
 13. *Exh.PG-46. Title 18, United States Code, Section 3286/Extension of statute of limitation for certain terrorism offences.*
 14. *Exh.PG-47 to Exh.PG-63. Affidavit of Oscar M. Gifford in support of request for extradition of Talha Haroon.*
 15. *Exh.PG-64. Photographs of Talha Haroon.*
7. The precise allegations referred in Exh.PG-3, affidavit of Assistant United States Attorney, George D. Turner, in support of request for extradition of Talha Haroon, which contains the charges and pertinent U.S. Law, are reproduced as under:-

The Charges and Pertinent U.S. Law.

"8. The Complaint charges in five counts that HAROON committed the following offences:

Count One: Conspiracy to use weapons of mass destruction, in violation of Title 18, United States Code (U.S.C.), Section 2332a(a)(2)(A), (a)(2)(B), and (a)(2)(D);

Count Two: Conspiracy to commit acts of terrorism transcending national boundaries, in violation of 18 U.S.C & 2332b(a)(1)(A), (a)(1)(B), (a)(2), (b)(1)(A), (b)(1)(B), and (b)(2);

Count Three: Conspiracy to bomb a place of public use and public transportation system, in violation of 18 U.S.C. & 2332f(a)(1)(A), (a)(1)(B), (b)(1), and (b)(2);

Count Four: Conspiracy to provide material support or resources to terrorists, in violation of 18 U.S.C. & 2339A; and

Count Five: Conspiracy to provide material support or resources to a designated foreign terrorist organization, in violation of 18 U.S.C & 2339B."

8. The affidavit of Oscar M. Gifford, Special Agent, Air Force Office of Special Investigations Task Force Officer, FBI contains overview of the application against Talha Haroon, which is reproduced as under:-

"As set forth in greater detail below and in the criminal complaint charging TALHA HAROON in the above-captioned case, beginning in at least April 2016, HAROON and a co-conspirator (referred to in the complaint and herein as "CC-1") plotted to carry out deadly bombings in heavily-populated areas of New York City for and in the name of the Islamic State of Iraq and the Levant (ISIL). Encrypted electronic communications between HAROON and an undercover law enforcement officers (the "UC"), and between CC-1 and the UC, demonstrated that HAROON and CC-1 supported ISIL and were planning to carry out coordinated terrorist attacks for and in the name of ISIL in New York City. In May 2016, HAROON and CC-1 took steps in preparation for executing the planned attacks. CC-1, who was located in a country outside the United States, purchased bomb-making materials, shipped them to the UC in the United States, and helped to secure a cabin within driving distance of New York City to use as a base for building the bombs and staging the planned attacks. Based on communications with the UC HAROON, a United States citizen residing in Pakistan, traveled within Pakistan in an effort to meet with an explosive expert in furtherance of the plot, repeatedly expressed his desire and intent to participate in the attacks, and took steps to renew his Pakistani visa to enable him to travel to the United States for purposes of carrying out the attacks. HAROON and CC-1 identified New York City's subway system (the "NYC Subway System"), Times Square, and particular concert venues, among other locations, as primary targets of the attacks."

The abovementioned details were placed before the Federal Government of Pakistan whereby an inquiry was notified on the basis of record, an inquiry Magistrate was appointed. Talha Haroon/petitioner No.2 was taken into custody and was put to inquiry before the inquiry Magistrate, who recorded his statement U/S 342 Cr.P.C, whereafter impugned order dated 16.01.2017 was passed by the Additional Deputy Commissioner (G) Islamabad/Magistrate, whereby the request has been concluded on the basis of available material and petitioner No. 2 has been recommended for extradition under the Extradition Act, 1972.

9. The primary question before this Court in judicial review is as to whether the procedure adopted by the Magistrate is within the four corners of law and whether the Inquiry Magistrate is bound to accept all the annexure/documents, which have been exhibited during inquiry by the Magistrate as the FIA has received these documents through Federal Government to be placed before the Inquiry Magistrate.

10. In order to reach at just conclusion of the case, following questions have been formulated:-

- (i) *What is the procedure for extradition of any offender provided under Extradition Act, 1972?*
- (ii) *What is the minimum requirement of inquiry under the law of Pakistan?*
- (iii) *Whether mere filing of documents along with request of extradition fulfills the requirements of Extradition Act, 1972 and constitutional guarantees under Article 4, 9, 10-A of the Constitution of the Islamic Republic of Pakistan, 1973 have been complied with, especially when the procedure provided under the Extradition Act, 1972 is not a substitute of trial?*
- (iv) *Whether terrorism or its conspiracy is included in the schedule of Extradition Act, 1972 on the basis of available record?*

11. While answering the Question (i) referred above, I have gone through Extradition Act, 1972 which relates to extradition of fugitive offender, which apply in relation to the return of persons to and from a treaty State subject to declaration under Section 3 of the Act or by a foreign State not being a treaty State subject to direction under Section 4 of this Act.

12. Section 3 of the Act deals with the State who enters into a treaty with the Federal Government, which has been published in official gazette in the list of foreign State which entered into extradition treaty regarding the offences specified in the schedule and as such the State called the treaty State for the purpose of Act and those persons, who fall

within the purview of said treaty, if accused of the offences notified in the schedule, shall be extradited.

13. Section 4 of the Act provides a concept of extradition with non-treaty State. Whereas, section 5 of the Act deals with the fugitive offender to be surrendered to the requesting State, however Section 5 is started with the negative word i.e. “NO”, such use of word by legislature puts certain conditionalities which were provided in Section 5(2)(a to g) which relates to the fundamental human rights or certain exceptions which were available to any individual in Pakistan, therefore, every case has to be processed in the light of said provision at the first instance.

14. The procedure for requisition for surrender of fugitive offender is provided in Section 6, 7, 8, 9 and 10 of the Act in a complete manner which includes the requisitioned for surrender of fugitive offender through a diplomatic representative of Pakistan, by the State asking for surrender on the basis of treaty or arrangement agreed with the other State. After receiving the request, the Federal Government may if it thinks fit, issue an order to inquire into the case to any Magistrate, whereafter the Magistrate level inquiry shall be initiated and all the documents/material evidence against the fugitive offender shall be placed before the Magistrate regarding the allegation on the basis of which the custody of fugitive offender has been claimed. The Magistrate exhibits all the documents and depositions in presence of person against whom the allegation has been leveled and all those documents have been considered and received which were authenticated, which requires specific authentication by the competent authorities of the foreign State

in a manner provided in Section 9(2)(a to d). The inquiry Magistrate after holding an inquiry under Section 10 of the Act prepare a report, which includes the opinion of Magistrate as to whether a *prima facie* case is made out in support of requisition for the surrender of the fugitive offender, the Federal Government may issue a warrant of custody and removal of fugitive offender for his delivery at a place and to a person named in the warrant.

15. The term "*prima facie*" has not been explained in the Act, therefore, the same has to be considered in its ordinary meaning i.e. "*based on the first impression; accepted as correct until proved otherwise*". The said term has also been explained in judgment reported as PLD 1989 Lahore 279 (Muhammad Asim Malik vs. Anwar Jalil), 1977 SCMR 220 (Sui Gas Transmission Company vs. Sui Gas Employees Union), 1992 CLC 2540 (Mst. Naz Shoukat Khan vs. Mrs. Yasmin R. Minhas) and in the recent judgment of this Court reported as PLD 2018 Islamabad 258 (Muhammad Shahid vs. Federation of Pakistan), wherein the term "*prima facie*" has been explained in the following manner:

"As per the black's law dictionary 8th Edition, "prima facie" means at first sight, on first appearance but subject to further evidence or information, and prima facie case means establishment of a legally required rebuttable presumptions.

16. In view of above legal requirements of the Extradition Act, 1972, the available affidavits and details provided in authenticated documents have been considered by this Court under judicial review in which the *prima facie* allegation against Talha Haroon is of conspiracy to commit an act of terrorism, transcending national boundaries or to use weapon of mass destruction in a public place or in a public transportation system. The record reflects that there is some encrypted electronic

communication between Haroon and undercover law enforcement officer called U.C. and co-accused CC-1 for execution of the plan, however those encrypted messages and other evidences were claimed to be in possession of Investigation Officer in USA, which were not brought on record for perusal of inquiry Magistrate in the extradition proceedings and as such, it is the minimum requirement for an offence of conspiracy in Pakistan in terms of Section 120(A) i.e. "*when two or more persons agreed to do, or cause to be done an illegal act, or an act which is not illegal, by illegal means through an agreement*" as held in 1998 P.Cr.LJ 1486 (Muhammad Ashfaque alias Chief, etc. vs. The State), 1989 PSC 533 (Kehar Singh vs. The State), and PLD 1979 SC 53 (Zulfiqar Ali Bhutto vs. The State). In present scenario, the requirement of conspiracy as provided in legal system of Pakistan has not been placed on record except the documents referred in the preceding paragraphs. Hence, the requirement of taking a prima facie view of Magistrate in inquiry is not visible.

17. While answering the Question (ii) i.e. what is the minimum requirement of inquiry under the law of Pakistan, the Extradition Act, 1972 provides a mechanism of inquiry on the order of Federal Government through a Magistrate notified in this regard and the phrase used in Section 7 for such purposes is "*the Federal Government may, if it thinks fit, issue an order to inquire into the case*". The said phrase used by the legislature put a heavy burden upon the Federal Government to look into the matter in a manner in which a person whose custody was claimed by the treaty State and gives complete right in all respect as it governs and deals with right of an individual viz-a-viz

the State. The State is responsible to provide due protection to every individual whether he/she is a citizen or not. Article 4 of the Constitution of the Islamic Republic of Pakistan, 1973 provides the protection of law and to be treated in accordance with law to every citizen of Pakistan but Article 4 at the same time covers "*every other person for the time being within Pakistan*" shall also be given a protection by the State against any action which is detrimental to his life, liberty, body, and reputation. In this scenario, the Islamic republic of Pakistan is responsible to protect the citizen as well as non citizen at the same time in terms of Article 4 and any request of treaty or non treaty State for surrender of fugitive offender has to consider in the light of fundamental guarantees provided in Constitution of the Islamic Republic of Pakistan, 1973 which also includes the protection in terms of Article 9 and 10-A of the Constitution of the Islamic Republic of Pakistan, 1973 in which no person shall be deprived of life and liberty save in accordance with law as well as in accordance with the concept of *fair trial and due process*.

18. While considering the above fundamental guarantees provided under the Constitution of the Islamic Republic of Pakistan, 1973 the concept of inquiry provided in Section 7, 8, 9 and 10 of the Extradition Act, 1972 is based upon term(s)

- a. Inquiry;
- b. submission of evidences of exhibits and depositions in presence of a person against whom they are used;
- c. warrants, depositions or Statements on oath with certificate of authentication; and
- d. *prima facie* case has to be made out in support of requisition for surrender of fugitive offender.

19. Since no formal procedure regarding the term “inquiry” has been provided in Extradition Act, 1972, it has to be considered in light of ordinary meaning as provided in Oxford Dictionary, wherein the term “inquiry” has been defined as “*make a formal investigation*”, whereas the Cambridge Dictionary defines the term “inquiry” as “*an official process to discover the facts about something, especially something bad that has happened*”. The term “inquiry” has also been referred in Section 2(k) of the Cr.P.C. which means every inquiry other than trial conducted under this Code by a Magistrate or a Court with the object to determine the truth or falsity of a certain fact while the Court or Magistrate applies its mind to make out whether to proceed with the trial or otherwise and eventually a trial begins after completion of inquiry, even the expression inquiry is not similar to judicial proceedings used in the criminal procedure code.

20. This Court has also considered available documents i.e. the warrant of arrest of Talha Haroon (Exh.PG-36), certified copy of complaint (Exh.PG/34-35) and affidavits (Exh.PG/3-13) along with affidavit of Oscar M. Gifford (Exh.PG/47-63) in juxtaposition with the findings of Inquiry Magistrate in the impugned order and it seems that the United States of America being the requesting state has submitted all the exhibited documents after their authentication by the Attorney General and US State Department as well as from other authorities to the State of Pakistan, whereas the Federal Government through which matter has been placed before inquiry Magistrate has merely played the role of a post office, even the Magistrate of inquiry by putting in full credence and believing its contents passed the impugned order in a

mechanical fashion without any confirmation from the Investigation Officer, who has investigated the initial crime.

21. In my understanding, the exhibited documentary evidence forwarded by the requesting State in shape of affidavits or statements are just documents (statements of facts) and the Magistrate relied upon the same believing that the same speak for itself. The concept of submission of facts through affidavits in legal jurisprudence of Pakistan is same as of any other foreign jurisdiction. Any fact deposed through affidavit has to be considered admissible if the deponent appears before the Court or authority before whom the affidavit of facts has been submitted. Article 10-A of the Constitution of the Islamic Republic of Pakistan, 1973 provides a guarantee of a fair trial as well as of due process and both these terms place a heavy burden upon the state functionaries to apply minimum standard through which the concept of transparency, fairness and impartiality should be reflected.

22. In order to settle the question regarding requirements of affidavit submitted in extradition proceedings and its legal effects, I have gone through judgment reported as 2017 CLD 631 (Bank of Punjab vs. M/s Anmol Textiles Mills Ltd., etc.), wherein DW-1 produce affidavits of DW-2 and DW-3, but they choose not to appear in the witness box to undergo the test of cross-examination, their affidavits have, therefore, no value. Even otherwise, affidavit is a declaration of fact made in writing and sworn on oath. Reliance is placed upon PLD 1995 Lahore 98 (Bashir Ahmad vs. Abdul Wahid), wherein it has further been held that it is meant for declaration of fact sought to be proved by the affidavit duly signed by the declarant. It is trite law that mere filing of affidavit without explanation of deponent would be of no use as held in 2017 CLC 1221

High Court AJK (Muhammad Zaman Tabbasum vs. Mehmood) and 2014 MLD 1206 (Mst. Iqbal Bibi vs. Learned Additional District Judge, etc.).

Lastly, the Hon'ble Lahore High Court in another reported judgment has further explained the concept in case reported as PLD 2016 Lahore 383 (Abdul Majeed vs. Abdur Rashid, etc.), wherein it has been held that:

"The burden was on defendant No.1 to prove his claim that plaintiff has surrendered his rights in disputed property by executing affidavit, therefore, his rights in disputed property by executing the affidavit, therefore, the relevant witnesses were required to be summoned by him for proof of affidavit. (Exh.D1). It is also well settled principle of law that a party relying on affidavit must produce the deponent for cross-examination and if deponent fails to submit to the cross-examination, the affidavit shall lose all its force as probative piece of evidence and cannot be acted upon. Reliance is placed upon PLD 1971 SC 585 President – Referring Authority vs. Mr. Justice Shoukat Ali."

23. While relying upon the above principles of law, I am of the view that the affidavits of facts submitted by Assistant US State Attorney George D. Turner (Exh.PG/3-13) and affidavit of Oscar M. Gifford/Special Agent (Exh.PG/14-35) in case of Talha Haroon are required to be processed through a test referred in the abovementioned case laws whereby the executants has to appear before the inquiry Magistrate to fulfill the minimum requirement of term "prima facie", especially when the allegations are of conspiracy against Talha Haroon, who is in Pakistan from last 10 years and have never been to USA.

24. Besides the above referred position, I have also gone through various case laws of extradition and observed therein the presence of witness, who has submitted details of facts being an Investigation Officer as well as a representative of foreign treaty State or person who was legally allowed to verify the foreign documents, order or who has authenticated the document received from the said State in shape of affidavit, whereafter the Magistrate on recording of statement of those individuals given its

findings while considering the same as minimum standard. Reference to this regard is made to the following cases of extradition.

- (a) PLD 1989 Lahore 279 (Muhammad Asim Malik vs. Anwar Jalil, etc.) where oral evidence of *Craig Lovato* appeared before the court as the Agent and Chief Investigator and deposed that the prosecution was in possession of oral evidence as well as documentary evidence proving against the fugitive offender the offence of conspiracy to distribute and import Hashish punishable in USA.
- (b) PLD 1993 Lahore 732 (Nargis Shaheen vs. Federation of Pakistan), in which *Shoaib Saeed* appeared as PW-1 on behalf of Ministry of Interior and submitted extradition document received from USA through Ministry of Foreign Affairs on 03.06.1992, asking for surrender of Mian Muhammad Azam/accused. In this regard, *Mr. Sher Gul Khan, Investigative Assistant of Drug Enforcement of Administration, USA* appeared as PW-2 and deposed that he has been associated with investigation of drug related activities of the accused and he has submitted complete insight of the manner and mode in which the accused committed the offence of conspiring to import and trafficking of heroine to the said State.
- (c) 1993 P.Cr.LJ 1082 (Nasrullah Khan Hunjra vs. Government of Pakistan) in which *Muhammad Darwood*, Section Officer, Ministry of Interior appeared as PW-1 during the course of inquiry proceedings and tendered in evidence a document received from the requesting state for extradition of fugitive

offender, whereas *Arnold R. Moorin, Special Case Agent of DEA* appeared as PW-2, who testified and interviewed the witnesses of that case, sworn statement before the grand Jury of Eastern District of New York and submitted complete insight of the crime with respect to the fugitive offender's involvement in aiding and abetting importation of a narcotics substances in the requesting State.

- (d) 1990 MLD 1611 (Zulqarnain Khan vs. Government of Pakistan) in which *Muhammad Dawood*, Section Officer, Ministry of Interior as well as *Mr. Benjamin Prainard, an American Investigator* appeared as PW-1 and PW-2, respectively, and supported the plea of extradition against Zulqarnain Khan/fugitive offender against his offence of conspiring smuggling of heroin from USA.

25. The above referred examples of different case studies give rise to a situation that cases and request of extradition have to be appreciated on the minimum standard of care, due process on the basis of principles of safe administration of justice, especially when the procedure of extradition is not clear however it has been observed from careful study of the above referred case laws that there are two set of cases in which request of extradition has been made by the requesting state i.e.,

- *Firstly*, there is an allegation of some extradition offence against the fugitive offender and the Investigation Officer of foreign jurisdiction has not yet concluded the investigation nor even submitted his complete investigation report before the Trial Court of that country, while no verdict (judicial pronouncement) was passed by the court of competent jurisdiction; and,

- *secondly*, where the Investigation Officer has submitted a complete report against the fugitive offender or other co-accused persons and the court of competent jurisdiction of foreign State after appreciation of evidence has passed the judgment in which the role of fugitive offender has also been thrashed.

In my humble understanding, the cases of first category somewhere fall in grey area as such cases are at inquiry/investigation stage in foreign jurisdiction, therefore, the inquiry Magistrate in Pakistan is bound to satisfy his conscience after perusal of documents, depositions, and affidavits brought before him, but in order to reach at just conclusion, it is necessary to call the official witness of Government of Pakistan, especially from Ministry of Interior or Ministry of Foreign Affairs, who receives the documents from the requesting state and shall appear before the inquiry Magistrate, to submit the same in order to confirm that the original documents have been brought before the Magistrate of inquiry through a channel notified by the Government of Pakistan. Such practice will eliminate any doubt or falsity of documents. Similarly, the inquiry Magistrate with view to reach at just conclusion should also call the Investigation Officer of the requesting state, who inquired and investigated the crime in his own jurisdiction due to the reason that such Investigation Officer has collected the evidence and other incriminating articles, recorded the statements of witnesses through which he believes that fugitive offender is linked with the alleged crime. Such Investigation Officer of foreign jurisdiction has to appear before inquiry Magistrate in Pakistan to record his statement and such witness is put to test of cross-examination so as to reach at just decision of the case in

which the inquiry Magistrate comes a definite conclusion that as to whether a *prima facie* case has been made out against the fugitive offender or otherwise, failing which the admissibility of statement placed before the inquiry Magistrate in shape of affidavit is of no legal worth.

26. While dealing with the scope and mode of magisterial enquiry under the Extradition Act, 1972, the legislature has provided Section 8 of the Act *ibid* which otherwise is quite exhaustive and provides a clear guidance to a Magistrate for holding magisterial enquiry, when the fugitive offender appears or is brought before him. For ready reference, Section 8 of the Extradition Act, 1972 is reproduced as under:

(8) (1) *On receipt of an order under Section 7, the Magistrate shall issue a summon or a warrant for the arrest of the fugitive offender according as the case appears to be one in which according to the law of Pakistan a summon or warrant would ordinarily issue.*

(2) *When the fugitive offender appears or is brought before him, the Magistrate shall enquire into the case in the same manner, and have the same jurisdiction and powers, as nearly as may be, as if the case were one triable by a court of session and shall take such evidence as may be produced in support of the requisition and on behalf of the fugitive offender, including any evidence to show that the offence of which the fugitive offender is accused or alleged to have been convicted is an offence of a political character or is not an extradition offence."*

The above referred Section has provided an exhaustive guideline to a Magistrate for holding an enquiry and has also provided the manner of inquiry with the words:

"In the same manner, and have the same jurisdiction and powers, as nearly as may be, as if the case were one triable by a Court of session."

Hence, it can safely be concluded that enquiry proceedings before the enquiry Magistrate shall not be a summary proceedings, rather it would

be in the same manner as a Sessions trial is conducted. In such eventuality, the enquiry Magistrate shall proceed with the matter like a trial court, especially in the manner as a sessions Court conducts the trial of an accused. Hence, the Extradition Act, 1972 itself provides complete mechanism to the fugitive offender to defend himself against the requisition made by requesting State to the Federal Government for surrender of such fugitive offender. As such, the enquiry Magistrate shall conduct the trial after giving full opportunity of producing evidence to the parties i.e. requesting State (who is seeking requisition of fugitive offender) as well as to the fugitive offender and shall also adopt every mode to dig out the truth.

27. While considering the entire discussion referred above in the light of case laws, I am of the view regarding answer to Question No. (iii) that following minimum requirements have to be observed in cases of extradition:

- (i) Request of foreign State for extradition of person,
- (ii) The presence of fugitive offender before the inquiry Magistrate,
- (iii) Submission of authenticated judicial documents stating the facts, allegations, by way of deposition, warrants, or statements on oath along with certificate of authority of the requesting State i.e. Secretary of State and Attorney General Office which purport to have been issued, received or taken by any court of justice outside Pakistan.
- (iv) In cases where judicial verdict has not yet been passed by the foreign court, the Investigation Officer of foreign jurisdiction/requesting State has to appear before the inquiry Magistrate in Pakistan to justify the allegation on the basis of his own investigation, statement of witnesses or other incriminating

articles collected by him/her through which the *prima facie* view regarding involvement of fugitive offender is reflected on record.

- (v) In case where the Investigation Officer of requesting state has not put appearance before the inquiry Magistrate in Pakistan during the extradition proceedings, due to his own safety, security or any other valid reasons, his statement could have been procured through a video link and the counsel for fugitive offender or his authorized representative can cross-examine the Investigation Officer in extradition proceedings in the office of Magistrate through the said facility of video link.
- (vi) The documents which were received from foreign jurisdiction transmitted by requesting state duly attested by competent authority including Secretary of the State under the seal of Department of Justice, Attorney General Office, or court of law shall be submitted before the inquiry Magistrate in Pakistan through the officer notified by the Government of Pakistan from Ministry of Interior or from Ministry of Foreign Affairs, who are the authorities under the law to receive and submit the documents of foreign jurisdiction to initiate extradition proceedings in Pakistan and such officer has to appear in-person before the inquiry Magistrate.
- (vii) In cases, where the court of foreign jurisdiction i.e. in the requesting State, has passed judgment against co-accused persons or the fugitive offender in a same case, its certified record should be considered valid for the purpose of extradition request without the presence of Investigation Officer before the inquiry Magistrate in extradition proceedings as the foreign judgment is admissible and presumption of truth is attached in terms of Articles 94 and

96 of the Qanun-e-Shahadat Order, 1984. Even, the judicial pronouncement of conviction purported to be certified by Judge/Magistrate or officer of the State has to be considered valid in terms of Section 9(2)(c) of the Extradition Act, 1972.

(viii) The Inquiry Magistrate shall proceed with the matter like a trial court, especially in a manner as of a sessions court in terms of Section 8(2) of the Extradition Act, 1972.

28. While answering the Question No. (iv), raised in Para-10 of this judgment, the term “*terrorism*” used during the course of arguments as well as referred in the charges by the US Authorities on five counts against Talha Haroon/petitioner No.2, it reveals that the entire case revolves around terrorism or its conspiracy, therefore, in order to resolve this controversy, I have gone through the schedule of Extradition Act, 1972, but I could not find the term “terrorism” therein and the same is not an extradition offence. However, the term “conspiracy” has been referred and the conspiracy to murder somehow falls within the concept of allegation against Talha Haroon/petitioner No.2 by the US authorities. In my humble view, it is now need of an hour to specify the term “terrorism” in the schedule of Extradition Act, 1972, although different countries have different meanings of the term “terrorism”, while the term “terrorism” has been explained in Section 6 of the Anti Terrorism Act, 1997 in the following manner in Pakistan.

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;*
- (c) *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;]*
- (d) *involves the doing of anything that is likely to cause death or endangers person's life;*
- (e) *involves kidnapping for ransom, hostage-taking or hijacking;*
- 1[(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]];*
- (f) *incites hatred and contempt on religious, sectarian or ethnic basis to strip up violence or cause internal disturbance;*
- (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;*
- (h) *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;

- (i) 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;*
- (j) involves the burning of vehicles or any other serious form of arson;*
- (k) involves extortion of money ("bhatta") or property;*
- (l) 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.*

29. The above referred definition if placed in juxtaposition with the charges referred by the US Government against Talha Haroon, there is no difference in the charges as the question relating to mass destruction or to create unrest, or planning to cause grievous hurt to public at large or to terrorize the public or to create sense of fear or insecurity in the society is visible from the charges referred by the US authorities, however all these charges are required to be proved in the court of law on the basis of evidence which has not yet been placed on record through Investigation Officer of the requesting State.

30. While considering the above principles and parameters laid down by this Court, I have gone through the findings given by the inquiry Magistrate in impugned order dated 16.01.2017, no valid reasons have been explained which would constitute a prima facie case, even the inquiry Magistrate has not discussed the minimum requirement of term “prima facie” rather he relied upon the statements of George D. Turner, Assistant United States Attorney (Exh.PG/3-13) and Oscar M. Gifford, Special Agent, Air Force Office of Special Investigations Task Force Officer, FBI (Exh.PG/47-63), although I have given an anxious thought to these affidavits which could not be considered valid at this stage, especially when deponent has not appeared before the Magistrate nor even gone through the test of cross-examination. Hence, this court is of

the view that the inquiry Magistrate has neither followed the true spirit of law nor considered the requirements of Article 4, 9, 10-A and 15 of the Constitution of the Islamic Republic of Pakistan, 1973 as the Constitution provides minimum guarantees of due process of law and equal protection of law which were discussed in details in the preceding paragraphs and as such, the impugned order is contrary to the terms of law and same is hereby SET ASIDE, the matter is remanded to inquiry Magistrate with the direction to conclude the same within the period of 02 months by calling the statements of Investigation Officer of requesting state as well as of the competent officer of Ministry of Interior or the Ministry of Foreign Affairs, as the case may be, in a manner discussed above. In case, the Investigation Officer of the requesting state is unable to appear, then his statement may be recorded through a video link.

31. During the course of argument, the Assistant Attorney General has also provided additional information on the basis of justice news issued by department of Justice Office of Public Affairs USA, dated 19.12.2018, regarding the conviction of Abdul Rehman EL Bahnasawy, 20 years of age of Mississauga, Canada, who was sentenced to 40 years imprisonment and a life time of supervised release for plotting to carrying out an attack on New York City during the summer of 2016 in support of ISIS, whereas Talha Haroon was arrested in Pakistan in September, 2016 and Salic was arrested in Philippine in April, 2017 based on complaints filed against them in Manhattan Federal Court and they remain in foreign custody pending proceedings for the their extradition to the US. The said information brought during the course of

final arguments may also be considered by the inquiry Magistrate in the de novo proceedings and if any judgment of conviction of co-accused of Talha Haroon has been passed by the court of competent jurisdiction in USA, its certified copy duly authenticated from the authorities may also be placed on record.

32. It is expected from the inquiry Magistrate to decide the inquiry within the period of 60 days while considering the entire background of this case and shall pass a speaking order after hearing the petitioners in accordance with law.

(MOHSIN AKHTAR KAYANI)
JUDGE

Announced in open Court on: 03.05.2019.

JUDGE

APPROVED FOR REPORTING

Khalid Z.

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