

Form No: HCJD/C-121.
ORDER SHEET.
IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

Criminal Appeal No. 121 of 2022

Raheem Ullah Khan

Versus

The State

S. No. of order/ proceedings	Date of order/ Proceedings	Order with signature of Judge and that of parties or counsel where necessary.
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15.03.2022. Mr. Muhammad Shahzad Siddiq, Advocate for the appellant.

BABAR SATTAR, J:- The appellant has impugned the order of the learned Judge Special Court (CNS), West-Islamabad dated 23.11.2021 pursuant to which the appellant was declared proclaimed offender and his perpetual non-bailable warrants were ordered to be issued.

2. The learned counsel for the appellant submitted that while the appellant failed to appear before the learned trial court on multiple grounds after the grant of bail due to which he was declared a proclaimed offender and his perpetual non-bailable warrants of arrest have been issued to present him before the court, his appeal may be accepted and the impugned order may be set-aside as he travelled to his village and for inadvertent reasons could not return to appear before the learned trial court.

3. We are not convinced by the arguments of the learned counsel for the appellant that there exists any reasonable explanation for his delinquency in not appearing

before the learned trial court or to excuse his conduct which reflects an abuse of the concession of bail.

4. The question before us is whether the appeal filed by an absconder can even be heard by this Court and whether the power of attorney constituted by an absconder can be treated as having been duly executed, granting a counsel appearing on behalf of such absconder the right to be heard before the court. Let us review the relevant case law:

- (i) In **Chan Shah Vs. The Crown (PLD 1956 Federal Court 43)** the application for grant of leave to appeal filed on behalf of an absconder came before the Federal Court and the following was held:

"In that situation, viz., as a fugitive from justice, Chan Shah presented himself before Mr. Nazir-ud-din, an Attorney of this Court, and signed a power-of-attorney in his favour, for the presentation to this Court of a petition for special leave to appeal.

The present is an "individual case", and, in our opinion, it is an essential condition of the administration of justice, in a case affecting an individual or individuals that the person concerned should submit to the due process of justice. We cannot conceive of a more flagrant violation of this condition than a case-like the present-where the individual seeks the interference of the Sovereign to obtain revision of a judicial order, when he is himself engaged in setting that judicial order at naught. We accordingly dismiss this petition, by reason of its being, in the existing circumstances, wholly unsuitable for the exercise of this Court's special jurisdiction in criminal cases.

It follows from what has been said above that Attorneys and Advocates who appear to present petitions, on the criminal side—other than those which lie as of right—are under a duty to see that they are acting in furtherance of justice. It seems to us that this duty is clearly violated when aid, for securing interference by this Court with a judicial order, is given by these officers of the Court to persons who, to their knowledge, are in contempt, i.e., as fugitives from justice, without at the same time ensuring that such persons conform to the judicial orders applicable to them.

- (ii) Reiterating the law laid down in **Chan Shah**, the apex Court in **Gul Hassan and another Vs. The State (PLD 1969 SC 89)** held that:

"We fully subscribe to this view and reiterate that the attorneys and members of the bar will bear in mind the serious consequence of committing contempt of this Court in moving on behalf of a prisoner who is a fugitive from law. The appeal filed by the counsel on the basis of the power-of-attorney (executed by Gul Hassan in favour of Khawaja Muhammad Khan before his absconsion was thus not properly constituted 'and should have been dismissed by the High Court on that "ground alone.

In this view Gul Hassan being a fugitive from law and, contemner was not entitled to hearing and leave granted to him on limited questions of law was liable to be rescinded. As to the proceedings under section 374, Cr. P. C., we endorse the view adopted by the learned Judges in the High Court that if a prisoner decamps and thereby forfeits the right of audience the sentence of death may be confirmed in his absence."

(iii) In **Hayat Bakhsh Vs. The State (PLD 1981 SC 265)** it was held that:

"Apart from other related questions, the two main questions involved in these two matters for determination are: (1) in Criminal Appeal 53, which has been filed as of right by the accused who, after acquittal by the trial Court, have been convicted by the High Court-whether Hayat Bakhsh and Allah Bakhsh son of Muhammad Bakhsh appellants, who did not surrender despite the orders of this Court, are entitled to the hearing of their appeal on merits in their absence without surrender and whether the same cannot be dismissed on the short ground of their non-surrender; and (2) in Criminal Appeal 130, which is not an appeal as of right but is on account of grant of leave to appeal by this Court to the complainant against the acquittal of the respondents by the High Court,- whether the appeal of those accused/ respondents who have not surrendered in obedience to the orders of this Court can be heard and disposed of on merits or otherwise on the basis of the negative conduct of the non-surrendering respondent, namely, Bakhsha.

The principle that the Court would not Act in aid of a person who is fugitive from Justice, was affirmed in the case of Chan Shah and a universal rule was reiterated that it is an essential condition of the administration of justice, in a case affecting an individual or individuals that the persons concerned should submit to the due process of justice. While administering a caution to the Attorneys and Advocates, the Court observed that steps should be taken to secure the appearance of the prisoner before this Court on the first day that the petition comes up for hearing and it is at that time that a move can be made through counsel for an order suspending the execution of

the High Court decision;... and that: a fugitive from law has no right of hearing before an appellate forum was affirmed in the case of Gul Hassan in such strong terms that he was treated as a contemner and even if he had been condemned to death by the trial Court, in a reference for confirmation of death sentence under section 374, Cr. P. C., the High Court could justifiably refuse to hear anything against confirmation of death sentence on behalf of the convict, who "decamps and thereby forfeits the right of audience", in that eventuality the "sentence of death may be confirmed in his absence". It was further held that in such a case the appeal filed by the counsel on the basis of the power of-attorney executed by the absconder in favour of a person before his absconsion was not properly constituted and the Court could ` dismiss the appeal filed on the basis of such a power-of-attorney on this ground alone;

There is nothing in the Constitution or the Rules to compel the Court to decide on merits an appeal filed by an accused person who has chosen to be a fugitive from justice, and while remaining so decide to disobey or frustrate the orders, directions and processes of the Court, from which he seeks justice.

(iv). In **Awal Gul V. Zawar Khan and others (PLD 1985 SC 402)** it was held by the apex Court that:

"Unfortunately it has not been noticed in the High Court that all the accused in this case absconded. It has also been ignored that in proper cases, even at the trial, abscondence can be treated as a very important piece of evidence (as corroboration of eye-witnesses on showing the conduct of the accused). It has also been unfortunately ignored that this Court has time and again cautioned that such a conduct cannot

be ignored under any law or principle. In some recent decisions also this question has been duly highlighted. They are Rais Khan v. Said Hanif and another (1979 SCMR 90). Rao Qadeer Khan v. The State (PLD 1981 SC93), Hayat Bakhsh and others v. The State (P L D 1981 SC 265) and Kh. Azhar Hussain and another v. The State (1983 S C M R 978). It is now well established law that a fugitive from law and Courts loses some of the normal rights granted by the procedural as also substantive law. It is also a well-established proposition that unexplained noticeable abscondence disentitles a person to the concession of bail notwithstanding the merits of the case-the principle being that the accused by his conduct thwarts the investigation qua him in which valuable evidence (like recoveries etc.) is simply lost or is made impossible to be collected (by his conduct). He cannot then seek a reward for such a conduct (in becoming fugitive from law)."

(v). In **The State Vs. Malik Mukhtar Ahmed Awan (1991 SCMR 322)** it was held by the august Supreme Court in relation to bail that:

"... it is not an absolute rule that a fugitive should under no circumstances be enlarged on bail although, it may be added, abscondence does constitute a relevant factor when examining the question of bail."

(vi) In **The State Vs. Haji Nasim-ur-Rehman (PLD 2005 SC 270)** it was held that:

8. It is important to note that in Criminal Original Petition, respondent had never prayed for grant of reliefs, which have been given to him as it is indicative from the above synopsis of the orders. Besides it, on appearance of the respondent, he was liable to be taken into custody because he was a convict but surprisingly, he was allowed to go scot free as is

evident from the order dated 21st April 2003. It may also be noted that according to Order XXIII Rule 8 First Proviso of the Rules, 1980, it is obligatory upon the, convict, who approaches the Court that first of all, he should surrender to the order of imprisonment, meaning thereby that on surrendering before the Court, he should be taken into custody and then the Court might order his release on bail and if such person is not taken into custody or not admitted to bail, then he will be deemed to be fugitive from law and would not be entitled to any relief as has been held in the case of *Hayat Bakhsh v. State* (PLD 1981 SC 265).

10. We are quite in agreement with the view point of the learned counsel and in view of observations in the case of *Chan Shah (ibid)*, We are persuaded to observe that besides the convict, Advocate-on-Record or Advocate Supreme Court who appeared on his behalf, should have ensured that respondent surrendered to the order of imprisonment and on his arrest the Advocate could have requested for suspension of the sentence of the convict, otherwise, it would be presumed that he is not discharging his duties faithfully. Similarly, in the case of *Hayat Bakhsh (ibid)* this Court after having surveyed the precedent law with regard to the right of a convict, who is fugitive from law observed that "there is considerable weight in the argument that when a convict becomes fugitive before filing a petition for leave to appeal, his petition itself would not be properly constituted". It was also observed that "if a convict becomes fugitive, he disentitles himself of the relief claimed from the Court. Likewise, if a convict absconds away after filing a petition for leave to appeal, or obtaining bail orders, for this reason as well, he would deprive himself of the relief claimed in 'the petition'. Similarly in the case of *Awal Gul v. Zawar Khan* (PLD 1985

SC 402), the principle laid down in the case of Hayat Bakhsh (ibid) has been reiterated.

(vii) In **Sharjeel Inam Vs. Federation of Pakistan and others (2017YLR2423 Islamabad)** this Court allowed protective bail to an absconder, but the distinguishing feature was that the petitioner had surrendered himself before the court and had sought protective bail to be able to appear before the competent court. It was held that:

11. As already noted, we are not required to decide the petition on merits or demerits of the case in the context of Section 497, Cr.P.C. The petitioner has shown his bona fides by surrendering before this Court and is only seeking protection so that his right to approach the competent Court or in other words access to justice be ensured. To the extent of this petition and for the purposes of granting protective bail we are satisfied that the abscondance of the petitioner is not unexplained. Nevertheless, this factor would indeed be considered by the competent court to which access is being sought by the petitioner.

5. In view of the law laid down by the august Supreme Court the doctrine of fugitive disentitlement under Pakistani law can be summarized as follows:

1. Under Pakistani law, the only statutory bar to absconder's recourse to courts for enforcement of rights is stipulated under Order XXIII Rule 8 of the Supreme Court Rules, 1980.
2. Unlike the U.S Courts and courts of other foreign jurisdictions, in Pakistan, in view of Article 175(2), the courts do not claim any inherent powers and instead rely on the powers conferred

under section 151 of Civil Procedure Code ("CPC") and section 561-A of the Code of Criminal Procedure Code ("Cr.P.C") in relation to the treatment meted out to fugitives and absconders.

3. Perusal of Pakistani jurisprudence reveals that our superior courts have recognized the doctrine of fugitive disentitlement to the extent of criminal appeals or related criminal matters. The honourable superior courts have refused to hear appeals filed by absconders in criminal matters on the basis of following equitable principles:

- a. Courts will not act in aid of injustice.*
- b. Courts will not allow abuse of process of court.*
- c. Essential condition of administration of justice that persons concerned should submit to the due process of justice (absconders violate this basic principle of administration of justice).*
- d. No one can be allowed to take advantage of their own wrong.*
- e. Allowing an absconder relief would amount to placing premium on absconsion and will amount to stultification of the authority of the Court by an unlawful act, which obviously cannot be the intention of the law.*
- f. Absconsion involves contempt of the process and authority of the court.*
- g. Power of Attorney or petition executed by a fugitive of law is not well constituted and therefore not entertainable.*
- h. Absconder loses right to audience before a court.*

4. In relation to bail, the question of abscondence is a relevant consideration in grant of bail, but refusal of bail to an absconder is not an absolute rule, once he surrenders to the law. Where an absconder is seeking protective bail to be able to surrender before the competent court and provides a reasonable explanation for his abscondence, the court may in its discretion

grant transitory bail to uphold the person's right to access to justice.

6. In view of the above, the appellant, being an absconder and a fugitive from law, can be granted no audience before this Court, until after he surrenders to the learned trial court. And any power of attorney issued by such absconding appellant is not duly constituted in view of the law laid down by the august Supreme Court. Consequently, any attorney who accepts a power of attorney from a fugitive or absconder, without first requiring the absconder to surrender before the law, also breaches his professional obligations to the law and the court. Taking a lenient view, we are not initiating disciplinary proceedings against the learned counsel who appeared on behalf of the absconding appellant. We however find that the instant appeal is not maintainable on the basis of the doctrine of fugitive disentitlement and is thus **dismissed in limine**.

(TARIQ MEHMOOD JAHANGIRI)
JUDGE

BABAR SATTAR)
JUDGE

Approved for reporting