JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

I.C.A.No.225 of 2019
Haroon-ur-Rashid and another
Versus
Federation of Pakistan and others

Dates of Hearing:	22.07.2019, 23.07.2019, 12.02.2020 & 22.07.2020.
Appellants by:	Mr. Idrees Ashraf, Advocate.
Respondents by:	Mr. Tariq Mahmood Khokhar, learned Additional Attorney General. Khawaja Imtiaz Ahmad, learned Deputy Attorney General. Mr. Muhammad Nadeem Khan Khakwani, learned Assistant Attorney General. Ch. Muhammad Tahir Mehmood, learned Assistant Attorney General. Mr. Muhammad Atif Khokhar, learned State Counsel. Mr. Qaiser Masood, Additional Director Law, F.I.A. Headquarter. Mr. Adeel Ahmed Sheikh, S.I. FIA/AHTC. Barrister Ummar Ziauddin and Barrister Zainab Janjua, learned *amici curiae.*

MIANGUL HASSAN AURANGZEB, J:- Through this judgment, we propose to decide intra Court appeals (I.C.A No.224/2019 and I.C.A. No.225/2019) since they entail certain common features.

2. Through I.C.A. No.225/2019, Haroon-ur-Rashid **("appellant No.1")** and his son, Talha Haroon **("appellant No.2")** impugn the judgment dated 03.05.2019 passed by the learned Judge-in-Chambers whereby writ petition No.1159/2017 filed by the appellants praying for the discharge of appellant No.2 against whom the Enquiry Magistrate, in his report dated 16.01.2017, had found a *prima facie* case for his extradition to the United States of America (**"USA"**) under the provisions of the Extradition Act, 1972 **("the 1972 Act")** was disposed of by setting aside the said enquiry report and remanding the matter to the Enquiry Magistrate with certain directions.

3. Through I.C.A.No.224/2019, the Federation of Pakistan also impugns the said judgment dated 03.05.2019 only to the extent of the learned Judge-in-Chambers holding that the witnesses who submit their affidavits in support of the extradition request have to be cross-examined and that the investigation officer of the country making the extradition request has to appear before the Enquiry Magistrate and record his evidence.

4. In this judgment, Haroon-ur-Rashid and Talha Haroon, the appellants in I.C.A. No.225/2019, shall be collectively referred to as **"the appellants"** whereas the Federation of Pakistan, the appellant in I.C.A. No.224/2019, shall be referred to as **"the respondent."**

5. It is an admitted position that there exists an extradition treaty between the USA and the Islamic Republic of Pakistan **("Pakistan")**. After the USA made a request to Pakistan for appellant No.2's extradition to USA, the Ministry of Interior, Government of Pakistan, vide order dated 03.11.2016 passed under Section 7 of the 1972 Act, directed Mr. Abdul Sattar Esani, Additional Deputy Commissioner (G), Islamabad to inquire into the case. Appellant No.2 was alleged to have been involved in a conspiracy to commit acts of terrorism in USA. The specific charges against appellant No.2 were stated to be as follows:-

> *"i) 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);*
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> *ii) 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);*
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> *iii) 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);*
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> *iv) Count Four: Conspiracy to provide material support or resources to terrorists, in violation of 18 U.S.C. & 2339A; and*
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> *v) Count Five: Conspiracy to provide material support or resources to a designated foreign terrorist organization, in violation of 18 U.S.C. & 2339B."*

6. Vide Memorandum dated 09.11.2016, the Enquiry Magistrate was requested by the office of the Chief Commissioner, Islamabad

Capital Territory to hold an enquiry and furnish findings in the matter concerning appellant No.2's extradition to USA. On 03.11.2016, the Enquiry Magistrate issued non-bailable warrants for appellant No.2's arrest. Appellant No.2 was arrested on 18.11.2016 and is presently confined in judicial custody.

7. The Enquiry Magistrate, after inquiring into the matter, submitted his report to the Federal Government on 16.01.2017. In the said report, the Enquiry Magistrate concluded that on the basis of sufficient incriminating documentary evidence available on the record, a *prima facie* case for appellant No.2's extradition to USA was made out. Furthermore, it was ordered that appellant No.2 be kept in prison till the Federal Government issues the final orders regarding his extradition.

8. On 14.03.2017, the Ministry of Interior (Government of Pakistan) issued a warrant under Section 11 of the 1972 Act for the custody and removal/extradition of appellant No.2. In the said warrant, it was explicitly stated that it had been decided to deliver appellant No.2's custody at Islamabad to a representative of the Government of the United States for his extradition to USA for facing a trial for the charges against him.

9. On 25.03.2017, the appellants filed writ petition No.1159/2017 before this Court. In the said writ petition, the appellants/petitioners prayed for the issuance of an order for appellant No.2's discharge. Along with the said petition, the appellants filed an application for an interim injunction against appellant No.2's extradition. The effect of the interim order dated 27.03.2017 passed by this Court in W.P.No.1159/2017 was that appellant No.2 was not extradited. The said writ petition was decided vide impugned judgment dated 03.05.2019. As mentioned above, the said judgment has been assailed by the appellants as well as the respondent.

10. Primarily, the appellants' case is that since the evidence produced by the prosecution before the Enquiry Magistrate against appellant No.2 was found by the learned Judge-in-Chambers to be insufficient to justify his extradition he should have been discharged, and that the order to remand the case to

the Enquiry Magistrate was unjustified. The respondent's case, in essence, is that the report dated 16.01.2017 issued by the Enquiry Magistrate did not suffer from any legal or jurisdictional infirmity, and that the law neither required the deponents of the affidavits filed in support of the extradition request to be cross-examined nor required the investigating officer in the requesting State to appear before the Enquiry Magistrate and give evidence.

CONTENTIONS OF THE LEARNED COUNSEL FOR THE APPELLANTS (HAROON-UR-RASHID AND TALHA HAROON):-

11. Mr. Idrees Ashraf, Advocate, learned counsel for the appellants, submitted that the appellants agree with the major portion of the impugned judgment; that there is no legal infirmity in the observation of the learned Judge-in-Chambers that an affidavit is inadmissible unless the deponent appears before the Court/Authority before which the affidavit is submitted and subjected to cross-examination; that as a result of the said observation, the prosecution's case is rendered as a case of no evidence; that in this scenario, the learned Judge-in-Chambers should have ordered for appellant No.2 to have been discharged and released; that the order to remand the case with the direction to hold a fresh enquiry is against the law; and that the direction for a fresh enquiry amounts to giving another opportunity to the prosecution to fill lacunae in their case.

12. He further submitted that the evidence produced before the Enquiry Magistrate in support of the request for appellant No.2's extradition was inadmissible; that the affidavits of the Assistant District Attorney and the Investigating Officer are entirely based on communications between an un-named co-conspirator, an un-named undercover agent in USA, and appellant No.2; that in the said affidavits filed in support of the extradition request, the depositions of the deponents are based on information provided to them by the undercover agent; that such information is clearly hearsay in nature and cannot form the basis for an extradition order; that the affidavits of the co-conspirator and the undercover agent were not produced before the Enquiry Magistrate; that the Investigating Officer, in his affidavit, does not depose that he had

collected any material connecting appellant No.2 with the Islamic State of Iraq and the Levant; that nothing incriminating was recovered from appellant No.2's house when it was raided by a local intelligence agency; that the offence which appellant No.2 is alleged to have committed is not an extradition offence either under the 1972 Act or the extradition treaty between Pakistan and USA; that an extradition treaty is to be strictly construed; that the offence of murder cannot be equated with the offence of terrorism; that since appellant No.2 had not committed any extradition offence, there was no reason for the learned Judge-in-Chambers to have remanded the matter for a fresh enquiry to the Enquiry Magistrate; and that since appellant No.2 is a citizen of Pakistan by descent, he has the protection of all the fundamental rights under the Constitution. Learned counsel for the appellants prayed for the impugned judgment dated 03.05.2019 to be modified and for appellant No.2 to be discharged and released.

CONTENTIONS OF THE LEARNED ADDITIONAL ATTORNEY GENERAL ON BEHALF OF THE FEDERATION OF PAKISTAN:-

13. Mr. Tariq Mehmood Khokhar, learned Additional Attorney General, on behalf of the Federation of Pakistan submitted that the report of the Enquiry Magistrate holding that a *prima facie* case for appellant No.2's extradition had been made out does not suffer from any legal infirmity; that appellant No.2 had conspired to commit acts of terrorism in USA; that ample evidence had been brought on record, in the form of affidavits, to show that appellant No.2 was involved in the commission of an extradition offence; that appellant No.2 in his communication with an undercover agent in USA had disclosed his plan to carry out acts of terrorism in USA; that appellant No.2 also had a co-conspirator with whom he intended to execute the acts of terrorism; and that appellant No.2 was not required in USA for any act of a political character.

14. He further submitted that the learned Judge-in-Chambers erred by not appreciating that there was no provision in the 1972 Act which required an officer investigating an offence in the requesting State to appear before the Enquiry Magistrate in Pakistan in order to give evidence in support of the extradition

request; that there are several precedents where fugitive offenders, required by a requesting State to undergo a trial in such a State, have been extradited without the investigating officer being required to appear before the Enquiry Magistrate; that there is also no requirement in the 1972 Act for the deponent of a duly authenticated affidavit filed in support of an extradition request to appear before the Enquiry Magistrate for the purpose of cross-examination; that as long as the documents produced before the Enquiry Magistrate in support of an extradition request are executed in accordance with Section 9(2) of the 1972 Act, they are admissible in evidence; that the documents on which reliance was placed by the prosecution were authenticated in accordance with Section 9(2) of the 1972 Act; that it is well settled that the proceedings before the Enquiry Magistrate are not a trial but simply an enquiry; that in such an enquiry the guilt of the fugitive offender need not be established; and that in such proceedings, the Enquiry Magistrate is to determine whether, on the basis of the documents on record, a *prima facie* case had been made out in support of the fugitive offender's extradition. The learned Additional Attorney General prayed for I.C.A. No.224/2019 to be allowed and for I.C.A.No.225/2019 to be dismissed.

15. The learned *amici curiae* submitted well-prepared briefs on the subject duly supported by case law.

16. We have heard the contentions of the learned counsel for the appellants and the learned Additional Attorney General as well as the learned *amici curiae* and have perused the record with their able assistance. The facts leading to the filing of the instant appeals have been set out in sufficient details in paragraphs 5 to 10 above, and need not be recapitulated.

17. Appellant No.2 is a citizen of USA. He was born in the United States on 14.10.1997. He possesses United States passport bearing No.510566088 issued on 27.01.2014. The gist of the allegations against appellant No.2 is that the investigation conducted by the Federal Bureau of Investigation ("F.B.I.") revealed that from April 2016 onwards appellant No.2 and a Co-

conspirator ("C.C.") (whose identity was not disclosed in any of the documents accompanying the request for appellant No.2's extradition) 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 ("I.S.I.L"), which was designated as a Foreign Terrorist Organization ("F.T.O.") by the United States Government.

18. On 27.09.2016, special agent Oscar M. Gifford of the U.S. Air Force Office of Special Investigations filed a criminal complaint (16 Mag. 6132) before United States Magistrate Judge Gabriel W. Gorenstein for the Southern District of New York, formally charging appellant No.2 with the commission of criminal offences against the laws of the United States. On 27.09.2016, Judge Gorenstein signed a warrant for the arrest of appellant No.2 based on the charges in the complaint.

19. Appellant No.2's extradition to USA was being sought so that he could undergo a trial for the offences he was alleged to have committed. Under the provisions of the 1972 Act, a fugitive offender suspected to be in any part of Pakistan can be extradited. *"Fugitive offender"* has been defined in Section 2(1)(d) of the 1972 Act to mean a person who is (i) being accused of an extradition offence, or (ii) convicted of an extradition offence.

20. The learned Judge-in-Chambers has drawn a distinction between a request for extradition of a fugitive offender who is alleged to have committed an extradition offence and the matter is at the investigation stage in the requesting State, and a request for extradition of a fugitive offender against whom a judgment, specifying his role, has already been passed in the requesting State. After drawing the said distinction, it has been held that in cases where a judgment has not been passed against the fugitive offender and the matter is at an investigation/enquiry stage in the requesting State, *"the Inquiry Magistrate with a 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." **Furthermore, it was held that** ***"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 [to] 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."*** **The above-referred ratio in the judgment passed by the learned Judge-in-Chambers is what the Federal Government is most aggrieved by.**

21. As mentioned above, the 1972 Act provides a mechanism and procedure for the extradition of fugitive offenders who are alleged to have committed an extradition offence in the requesting State or have been convicted of such an offence by a Court in the requesting State. But the said Act does not differentiate between the manner in which evidence is to be produced before the Enquiry Magistrate during the enquiry proceedings for either category of the fugitive offenders.

22. The mandate of Section 9(1) of the 1972 Act is that exhibits and depositions (whether or not they are received or taken in the presence of the person against whom they are used) and official certificates of facts and judicial documents stating facts, may be received as evidence in the proceedings before the Enquiry Magistrate if such documents are duly authenticated. Section 9(2) of the 1972 Act provides that warrants, depositions or statements on oath (which purport to have been issued, received or taken by any Court of justice outside Pakistan) and certificates of, or judicial documents stating the facts of, conviction before any such Court, shall be deemed to be duly authenticated if the requirements of Section 9(2)(a) to (d) of the 1972 Act are fulfilled. These requirements are as follows:-

> ***"(a) if the warrant purports to be signed by a Judge, Magistrate, or officer of the State where the same was issued or acting in or for such State;***

(b) if the depositions or statements or copies thereof purport to be certified, under the hand of a Judge, Magistrate or officer of the State where the same were taken or acting in or for such State, to be the original depositions or statements or to be true copies thereof, as the case may require;

(c) if the certificate of, or judicial document stating the fact of, a conviction purports to be certified by a Judge, Magistrate or officer of the State where the conviction took place or acting in or for such State; and

(d) if the warrant, depositions, statements, copies, certificates and judicial documents, as the case may be, are authenticated by the oath of some witness or by the official seal of a minister of the State where the same were respectively issued, taken or given."

23. Section 9(1) of the 1972 Act does not provide a different mode for the production of evidence in the enquiry proceedings for the extradition of a fugitive offender alleged to have committed an extradition offence but not convicted of such an offence in the requesting State than the mode for the production of evidence in the case of a fugitive offender who has already been convicted of an extradition offence in the requesting State.

24. It is an admitted position that along with the request for appellant No.2's extradition, affidavits of Oscar M. Gifford (Special Agent with the Air Force Office of Special Investigations assigned as Task Force Officer with the New York Joint Terrorism Task Force of the Federal Bureau of Investigation) and George D. Turner (Assistant United States Attorney) were submitted. The said affidavits were sworn by the deponents before the United States Magistrate Judge, Southern District of New York. The request for appellant No.2's extradition was also accompanied by a certification dated 17.10.2016 by Jeffrey M. Olson, Associate Director, Office of International Affairs, Criminal Division, Department of Justice, USA, certifying that the affidavits of Oscar M. Gifford and George D. Turner were sworn before the United States Magistrate Judge on 14.10.2016. A certificate executed on 18.10.2016 by the Attorney General of the United States bearing the seal of the United States Department of Justice was also issued in support of the certification of Jeffery M. Olson. The request for appellant No.2's extradition was also accompanied by a certificate from John F. Kerry, then Secretary of State,

Department of State, USA. All these documents were produced in evidence by Khalid Naeem, Public Prosecutor, FIA/Assistant Director Legal, Islamabad, during the enquiry proceedings before the Enquiry Magistrate. These affidavits were produced as Exhibits PG.3 to 13 and PG.47 to 63. The Enquiry Magistrate had put a different exhibit number on every page of the affidavits.

25. It is not the appellants' case that any of the exhibits, depositions, official certificates of facts, warrants, or statements on oath filed along with the request for extradition were not duly authenticated in the manner as required by Section 9(2) of the 1972 Act. Nevertheless, it is our view that since the documents produced in evidence in support of the request for appellant No.2's extradition satisfied the requirements of Section 9(2) of the 1972 Act, they could have been taken into consideration and relied upon by the Enquiry Magistrate to form an opinion as to whether a *prima facie* case had been made out in support of the requisition for the surrender of appellant No.2.

26. In terms of Entry No.18(5)(c) in Schedule II read with Rule 3(3) of the Rules of Business, 1973, the subject of admission of persons into and departure of persons from Pakistan, including extradition and expulsion from Pakistan, is a subject to be dealt with by the Interior Division. We would tend to agree with the learned Judge-in-Chambers that henceforth, in order to eliminate any doubt as to the genuineness of the request for extradition and the affidavits, depositions and other documents accompanying such a request ought to be produced before the Enquiry Magistrate appointed pursuant to Section 7 of the 1972 Act by an officer duly authorized by the Section of the Ministry of Interior designated to deal with extradition requests. Furthermore, we also agree with the learned Judge-in-Chambers that the Federal Government ought not to act like a post office by simply forwarding an extradition request to an Enquiry Magistrate appointed pursuant to Section 7 of the 1972 Act.

27. When a requisition for the surrender of a fugitive offender is made to the Federal Government in accordance with Section 6 of the 1972 Act, the Federal Government, before issuing an order to

an Enquiry Magistrate to inquire into the case in terms of Section 7 of the 1972 Act, is expected in the very least to satisfy itself on the following matters:-

i) **Whether the requesting State is included in the list of foreign States published by the Federal Government in the official gazette under Section 3(1) of the 1972 Act, with which an extradition treaty is in operation, and is therefore a treaty State for the purposes of the 1972 Act.**

ii) **Whether the offence, which the fugitive offender is alleged to have committed or for which he has been convicted in the requesting State, is specified in the declaration made by the Federal Government pursuant to Section 3(2) and (3) of the 1972 Act.**

iii) **Whether the offence, which the fugitive offender is alleged to have committed or for which he has been convicted in the requesting State, is an *"extradition offence"* as defined in Section 2(1)(a) of the 1972 Act and finds mention in the Schedule to the said Act.**

iv) **Whether the request for the extradition of a fugitive offender has been made to the Federal Government in accordance with the manner prescribed in Section 6 of the 1972 Act.**

v) **Whether the Federal Government is satisfied in terms of Section 5(2)(a) of the 1972 Act that the offence in respect of which the surrender of a fugitive offender is sought is not of a political character.**

28. Now, the learned Judge-in-Chambers has taken the view that a fact deposed in an affidavit produced in evidence would be considered admissible if the deponent appears before the Court or authority before whom the affidavit has been submitted. In holding so, the learned Judge-in-Chambers placed reliance on Article 10A of the Constitution and the law laid down by the Superior Courts in the cases of Bank of Punjab Vs. M/s Anmol Textiles Mills Ltd. etc. (2017 CLD 631), Muhammad Tabbasum Vs. Mehmood (2017 CLC 1221 High Court AJK), Abdul Majeed Vs. Abdur Rashid (PLD 2016 Lahore 383), Mst. Iqbal Bibi Vs. Learned Additional District Judge, etc. (2014 MLD 1206), and Bashir

Ahmad Vs. Abdul Wahid (PLD 1995 Lahore). Indeed in the said judgments, it has been held *inter alia* that where the deponent of an affidavit produced before the Court does not appear before the Court to undergo the test of cross-examination, the facts deposed in the affidavit would be of no evidentiary value.

29. We have noted that none of the judgments referred to by the learned Judge-in-Chambers relate to extradition proceedings under the provisions of the 1972 Act. Additionally, the said judgments relate to the evidentiary value of an affidavit where the deponent does not appear before a Court to make a statement in support of the facts deposed in the affidavit or to be cross-examined during a trial as opposed to enquiry proceedings.

30. We find the observations of the learned Judge-in-Chambers to the effect that the affidavit produced in support of an extradition request to be no evidentiary value unless the deponent is produced for cross-examination not to be in consonance with the law laid down by the Superior Courts. In the case of Abdul Ghaffar Vs. Federation of Pakistan (PLJ 1999 Lahore 348), the Enquiry Magistrate, in his enquiry report, had recommended that the petitioner be extradited to USA. In the said case, the prosecution had produced before the Enquiry Magistrate depositions of special agents of the Drug Enforcement Agency of USA. These depositions were in the nature of affidavits sworn by special agents before the Magistrate, District Court, Eastern District of Virginia duly verified by the Attorney General. The prosecution, without formally tendering these depositions in evidence, brought them on record to be read as evidence in the enquiry proceedings for the extradition of the petitioner in the said case. The petitioner had objected to the production of the depositions on the ground that without the production of their deponents in the witness box and providing an opportunity to him to cross-examine them, the depositions could not be considered as evidence in the enquiry under Section 8 of the 1972 Act. The said objection did not find favour with the Hon'ble Lahore High Court which dealt with the same in the following terms:-

> ***"13. The real controversy involved in the present case is as to whether for the purpose of an inquiry under Extradition Act, 1972, the examination of the witnesses proposed to be produced in proof of the charge at the trial to be held in a Foreign Country is necessary at the inquiry or their deposition in the nature of affidavits sworn before the concerned forum in such country was sufficient to measure the nature of allegations and the evidence in support thereof to ascertain the responsibility of an accused and justification of his extradition. The inquiry and trial are independently defined in the Criminal Procedure Code. Inquiry is different to the trial, which is conducted to find out the existence or otherwise of a prima facie case and is not equated with a regular trial by the concerned Court to give finding of guilt.***
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> ***14. Taking the correct view of the matter, the law does not require the production of a witness from the country in which the trial is to be held. The only requirement is that the evidence proposed to be brought against a fugitive offender should be made available to the country from where the fugitive offender is required to be sent. The deposition of Faheem Ashraf in the nature of affidavit duly recorded before the Magistrate in Virginia and certified by the Attorney General produced before the Inquiry Magistrate sufficiently fulfilled the requirement of Section 8(2) of the Extradition Act, 1972, and the personal appearance of the witnesses before the Inquiry Magistrate was not necessary. There being clear distinction between the trial and the inquiry, the requirement of law is that the inquiry proceedings should be as nearly as possible to the procedure for the trial before the Sessions Court, but it does not mean that the inquiry should be converted into trial."***
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> **(Emphasis added)**

31. The said judgment of the Hon'ble Lahore High Court was upheld by the Hon'ble Supreme Court in the judgment reported as Abdul Ghaffar Vs. Federation of Pakistan (2000 SCMR 1536). The question as to whether the deponent of an affidavit filed in support of an extradition request is to appear before the Enquiry Magistrate was also considered by the Hon'ble Supreme Court in the said judgment wherein it was *inter alia* held as follows:-

> ***"We find that the learned Judge in Chambers was quite right in opining that the personal appearance of witnesses before the Inquiry Magistrate was not necessary in that the material/evidence brought against the petitioner, including the deposition of Faheem Ashraf in the form of an affidavit duly recorded before the Magistrate in Virginia, USA and certified by the Attorney-General, was produced before the Inquiry Magistrate and the same was in line with the requirements of section 8(2) of the Extradition Act, 1972."***

32. Through the judgment reported as "Nasrullah Khan Henjra Vs. Government of Pakistan"(PLD 1994 SC 23), the Hon'ble Supreme Court decided appeals filed by three different fugitive offenders who had challenged judgments passed by the Hon'ble

Lahore High Court dismissing writ petitions challenging reports of Enquiry Magistrates recommending the extradition of such fugitive offenders. Perusal of the said judgment shows that a specific objection was taken to the report of the Enquiry Magistrate on the ground that the Enquiry Magistrate should have examined the witnesses, and afforded an opportunity to the petitioner to cross-examine them. This objection did not find favour with the Hon'ble Supreme Court which spurned the same in the following terms:-

> ***"8. As already indicated, together with the requisitions for the surrender of the petitioners the diplomatic representative of the United States Government sent to the Federal Government a number of documents. These included affidavits of persons who, except in the case of Nasrullah Khan Henjra, had direct dealings and association with the petitioners in regard to the smuggling of heroin in the United States. These affidavits were placed on the record of the proceedings conducted by the learned Magistrate and by operation of section 9(1), ibid, were treated as evidence by him. Copies of these affidavits were delivered to the petitioners and sufficient time was given to them before their statements under section 342, Criminal Procedure Code, were recorded. The petitioners also filed written statements in refutation of the charges being levelled against them; however, they did not lead any evidence in defence. We are unable to find any legal defect in the procedure adopted by the learned Magistrate."***

33. In the said case, the Hon'ble Supreme Court did not feel the need to require the officers investigating the case against the fugitive offender or the witnesses whose affidavits/statements had been produced in evidence to appear before the Enquiry Magistrate for the purpose of cross-examination. Moreover, in paragraph 7 of the said judgment it has been observed that the 1972 Act takes notice of the difficulty which the requisitioning State may face in producing evidence before the Enquiry Magistrate, and in order to get over this difficulty a special provision has been made in Section 9(1) of the 1972 Act for the manner in which evidence is to be produced before the Enquiry Magistrate.

34. In the case of Mst. Akhtar Malik Vs. Federation of Pakistan (1994 P.Cr.L.J. 229), the Division Bench of the Hon'ble Lahore High Court addressed the question as to whether during the enquiry proceedings before the Enquiry Magistrate, the evidence

produced against the fugitive offender was in accordance with the law in the following terms:-

> ***"The definition of "evidence" as given in Qanun-e-Shahadat, 1984, shows that the word "evidence" as used means statement of the witnesses and the documents. Therefore, it cannot be said that in the case in hand the evidence is not there, merely for the reasons that oral statement of witnesses have not been recorded. The documents are on the record and although were not formally tendered in evidence by the prosecution; the fact remains that the said material was on file within the knowledge of the accused who had been confronted therewith and who knew as to what material is to be used against them and had full opportunity to prove, that the allegations levelled in the material were false. The affidavits/documents having been duly authenticated and attested by competent authorities/Courts of a foreign country were per se evidence in the case as per provisions of section 9 of the Act. Hence, the same can be used against the accused for prosecuting them and the said material is quite sufficient for coming to the prima facie conclusion that the accused persons are guilty of the offences alleged to have been committed by them."***

The said judgment of the Hon'ble Lahore High Court was upheld by the Hon'ble Supreme Court in the judgment reported as "Nasrullah Khan Henjra Vs. Government of Pakistan" (PLD 1994 SC 23).

35. Section 9 of the 1972 Act is in *pari materia* to Section 10 of the Indian Extradition Act, 1962. In the case of Sarabjit Rick Singh Vs. Union of India (2008 (2) SCC 417), it was held as follows:-

> ***"36. In a proceeding for extradition no witness is examined for establishing an allegation made in the requisition of the foreign State. The meaning of the word "evidence" has to be considered keeping in view the tenor of the Act. No formal trial is to be held. Only a report is required to be made. The Act for the aforementioned purposes only confers jurisdiction and powers of the Magistrate which he could have exercised for the purpose of making an order of commitment. Although not very relevant, we may observe that in the Code of Criminal Procedure, 1973, the powers of the committing Magistrate have greatly been reduced. He is now required to look into the entire case through a very narrow hole. Even the power of discharge in the Magistrate at that stage has been taken away.***
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> ***37....***
>
> ***38. Section 10 of the Act provides that the exhibits and depositions (whether received or taken in the presence of the person, against whom they are used or not) as also the copies thereof and official certificates of facts and judicial documents stating facts may, if duly authenticated, be received as evidence. Distinction must be borne in mind between the evidence which would be looked into for its appreciation or otherwise for a person guilty at the trial and the one which is required to make a report upon holding an inquiry in terms of the provisions of the Act. Whereas in the trial, the court may look into both oral and***

documentary evidence which would enable it to ask any question in respect of which the accused may offer explanation, such a detailed procedure is not required to be adopted in an inquiry envisaged under the said Act. If evidence strictosensuis required to be taken in an inquiry forming the basis of a prima facie opinion of the court, the same would lead to a patent absurdity. Whereas in a trial the court for the purpose of appreciation of evidence may have to shift the burden from stage to stage, such a procedure is not required to be adopted in an inquiry. Even under the Code of Criminal Procedure existence of strong suspicion against the accused may be enough to take cognizance of an offence which would not meet the standard to hold him guilty at the trial."

36. The above-referred dicta of the Hon'ble Supreme Court of Pakistan causes us to hold that it is not obligatory for the deponents of affidavits filed in support of extradition requests to appear as witnesses before the Enquiry Magistrate for the purpose of cross-examination on the facts deposed in their affidavits. There is, however, no bar in the 1972 Act for the Enquiry Magistrate to require the presence of the deponent of the affidavit produced in support of an extradition request in the event the Enquiry Magistrate considers such presence essential so as to enable him to form an opinion that a *prima facie* case has been made out for the extradition of a fugitive offender.

37. For the learned Judge-in-Chambers to hold that the Enquiry Magistrate *"should also call the Investigation Officer of the requesting State, who inquired and investigated the crime in his own jurisdiction"* does not, in our view, find support in any of the provisions of the 1972 Act, but rather goes contrary to the above referred ratio in the cases of Abdul Ghaffar Vs. Federation of Pakistan *(supra) and* Nasrullah Khan Henjra Vs. Government of Pakistan *(supra).* In the impugned judgment, reference has been made to a few judgments of the Superior Courts showing that witnesses had appeared before the Enquiry Magistrate during extradition proceedings. We have had the opportunity of going through the said judgments but in none of them was it held that a witness on behalf of the requesting State or the Ministry of Interior appearing before the Enquiry Magistrate had to be cross-examined in order for his affidavit/testimony to be admitted in evidence.

38. It is on the basis of the insertion of Article 10A in the Constitution that the learned Judge-in-Chambers held that *"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."* Indeed Article 10A of the Constitution provides that for the determination of his civil rights and obligations or in any criminal charge against him, a person shall be entitled to a fair trial and due process. The writ petitioners before the learned Judge-in-Chambers had not challenged any of the provisions of the 1972 Act on the touchstone of Article 10A of the Constitution. It may be mentioned that in the case of Nargis Shaheen Vs. Federation of Pakistan (PLD 1993 Lahore 732), the Full Bench of the Hon'ble Lahore High Court held *inter alia* that the provisions of the 1972 Act were not illegal or *ultra vires* the Constitution and that they were in accord with the injunctions of Islam as set out in the Holy Quran and *Sunnah* as well as the intrinsic object of International Treaties entered into by a Muslim State. The said judgment was upheld by the Hon'ble Supreme Court of Pakistan vide judgment reported as Nargis Shaheen Vs. Federation of Pakistan (1994 SCMR 1706).

39. In the judgment passed by the Hon'ble Supreme Court in *suo moto* case No.4/2010 (PLD 2012 SC 553), the Hon'ble Supreme Court rejected the argument that the issuance of a show cause notice and the framing of a charge for Contempt of Court against the respondent would violate his rights under Article 10A of the Constitution on the ground that the Court had formed a *prima facie* opinion in the matter by initiating *suo moto* action against the respondent. Reference was made by the Hon'ble Supreme Court to the judgment in the case of President Vs. Shaukat Ali (PLD 1971 SC 585), wherein it was held *inter alia* that a preliminary enquiry intended to determine whether a *prima facie* case had been made out or not is a safeguard against the commencement of wholly unwarranted final proceedings against a person.

40. It has consistently been held that the Magisterial enquiry which is conducted pursuant to the request for extradition is not a trial. The said enquiry decides nothing about the innocence or guilt

of the fugitive offender. The main purpose of the enquiry is to determine whether there is a *prima facie* case or reasonable grounds which warrant the fugitive offender to be sent to the requesting State. The jurisdiction of the Enquiry Magistrate is limited and is not concerned with the merits of the trial. The provisions of the 1972 Act do not contemplate production of any oral evidence by the Federal Government. No fact needs to be proved by evidence. What is necessary is to arrive at a finding that a *prima facie* case has been made out for extradition from the depositions, statements, copies, and other information which are to be gathered from the official certification of facts and judicial documents produced in accordance with the requirements of Section 9 of the 1972 Act.

41. Now, there is a catena of case-law specifically dealing with extradition cases wherein it has been held that the proceedings before the Enquiry Magistrate under Section 8 (2) of the 1972 Act are not a trial but an enquiry. Section 4(k) of the Criminal Procedure Code, 1898 provides that *"enquiry"* includes every enquiry other than a trial conducted under the Code by a Magistrate or a Court. The word *"enquiry"* as used in the context of Sections 6 and 7 of the 1972 Act has been explained by the Hon'ble Supreme Court in the case of Muhammad Azim Malik Vs. Government of Pakistan (PLD 1989 SC 519) to be coextensive with the power of the Magistrate 1St Class to hold an enquiry into an offence whether triable by himself or not. It was also explained that under the provisions of the 1972 Act, the Enquiry Magistrate conducts an enquiry and not a trial. Additionally, in the case of Muhammad Asim Malik Vs. Anwar Jalil (PLD 1989 Lahore 279), it was held that the enquiry conducted by a Magistrate to find out the existence or otherwise of a *prima facie* case could not be equated with a regular trial by a Court of law.

42. Section 8(2) of the 1972 Act provides *inter alia* that when the fugitive offender appears or is brought before the Enquiry Magistrate, the latter *"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."

43. In paragraph 26 of the impugned judgment, the learned Judge-in-Chambers, after referring to Section 8(2) of the 1972 Act, held as follows:-

> ***"Hence, it can safely be concluded that enquiry proceedings before the enquiry Magistrate shall not be a summary proceeding, 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."***

44. With utmost respect to the learned Judge-in-Chambers, we cannot bring ourselves to subscribe to his interpretation of Section 8(2) of the 1972 Act. In our view, what the Enquiry Magistrate has to ascertain during the proceedings under Section 8 of the 1972 Act is whether the material placed before him is sufficient to establish a *prima facie* case to justify the trial of a person whose extradition is sought. This is of course in cases where the fugitive offender has not been convicted by a Court in the Treaty State seeking his requisition.

45. The mere fact that Section 8(2) of the 1972 Act requires the Enquiry Magistrate to conduct the enquiry in a manner as if the case was one triable by a Sessions Court does not *ipso facto* make the proceedings before the Enquiry Magistrate into a trial. The scope of the enquiry to be conducted by the Enquiry Magistrate in terms of Section 8(2) of the 1972 Act has been well explained by the Division Bench of the Hon'ble Lahore High Court in the case of Muhammad Asim Malik Vs. Anwar Jalil (PLD 1989 Lahore 279). In the said case, the Division Bench of the Hon'ble Lahore High Court held *inter alia* that the only pre-requisite for the

Enquiry Magistrate was to ascertain whether on the basis of material placed before him in accordance with the requirements of the 1972 Act, a *prima facie* case as understood in legal parlance was made out. Furthermore, it was held that the Enquiry Magistrate was not expected to return a verdict of guilt upon the offender but that what the Enquiry Magistrate was obligated to find was whether a triable case was made out. Law to the same effect was recently laid down by this Court in the case of Tahir Attique Zarif Vs. Federation of Pakistan (PLD 2019 Islamabad 483).

46. We find the interpretation of the learned Judge-in-Chambers placed on Section 8(2) of the 1972 Act also to be contrary to the Hon'ble Supreme Court's interpretation of the said Section. In the case of Nasrullah Khan Henjra Vs. Government of Pakistan *(supra)*, the Hon'ble Supreme Court in paragraph 6 of the said report, after reproducing Section 8(2) of the 1972 Act, interpreted the same in the following terms:-

> ***"If after considering the material before him the Magistrate forms the opinion that a prima facie case has not been made in support of the requisition for the surrender of the fugitive offender, he must discharge him and make a report to that effect to the Federal Government. But if on the other hand he comes to the conclusion that a prima facie case has been made out in support of the requisition he is required to send inter alia a report to the Federal Government and commit the fugitive offender to prison to await the orders of the Federal Government. (See section 10 of the Act). Under section 11, on receipt of the report from the Magistrate the Federal Government may, if it thinks fit, issue a warrant for the surrender of the fugitive offender to the requisitioning country."***

47. The said interpretation of the Hon'ble Supreme Court would indicate that the Enquiry Magistrate is not required by the provisions of the 1972 Act to conduct the enquiry proceedings like a criminal trial before a Sessions Court. It is not mandatory for the Enquiry Magistrate to summon witnesses whose depositions or affidavits accompany the request for extradition or the Officer investigating the offence against the fugitive offender in the country making such a request. Such depositions or affidavits produced before the Enquiry Magistrate are to be treated as evidence by operation of Section 9(1) of the 1972 Act. What is

however required is for such depositions or affidavits and other documents accompanying the request for extradition be delivered to the fugitive offender and sufficient time be given for the recording of his statement under Section 342 Cr.P.C. This is implicit in the observations of the Hon'ble Supreme Court in paragraph 8 of the judgment in the case of Nasrullah Khan Henjra Vs. Government of Pakistan *(supra)* which is reproduced herein below:-

> ***"As already indicated, together with the requisitions for the surrender of the petitioners the diplomatic representative of the United States Government sent to the Federal Government a number of documents. These included affidavits of persons who, except in the case of Nasrullah Khan Henjra, had direct dealings and association with the petitioners in regard to the smuggling of heroin in the United States. These affidavits were placed on the record of the proceedings conducted by the learned Magistrate and by operation of section 9(1), ibid, were treated as evidence by him. Copies of these affidavits were delivered to the petitioners and sufficient time was given to them before their statements under section 342, Criminal Procedure Code, were recorded. The petitioners also filed written statements in refutation of the charges being levelled against them; however, they did not lead any evidence in defence. We are unable to find any legal defect in the procedure adopted by the learned Magistrate."***

48. In the case of Muhammad Azim Malik Vs. Government of Pakistan (PLD 1989 SC 519), an objection was raised on behalf of the fugitive offender that since the offence which was alleged to have been committed by the fugitive offender was triable under the laws of Pakistan by a Court of Sessions, therefore the Enquiry Magistrate had no jurisdiction under Section 8 of the 1972 Act to conduct the enquiry. While spurning the said objection, the Hon'ble Supreme Court held that the Enquiry Magistrate *"conducts an inquiry and not a trial and an inquiry, under the Criminal Procedure Code, also is different from the trial."* Furthermore, in the case of Mst. Akhtar Malik Vs. Federation of Pakistan (1994 P.Cr.L.J. 229), an objection was taken on behalf of the fugitive offender that the enquiry proceedings were not conducted by the Enquiry Magistrate in accordance with Section 8 of the 1972 Act inasmuch as neither was any charge framed nor was any evidence recorded nor was any incriminatory evidence on the basis of which the fugitive offender was sought to be

extradited put to him portion-wise. The said objection was rejected by the Hon'ble Lahore High Court in the following terms:-

> ***"16. Arguments of the learned counsel for the petitioners with regard to the holding of mode of inquiry as envisaged by the Act and as held by the learned Enquiry Officer are also misconceived. The provisions of section 8 of the Extradition Act read with Article 9 of the Treaty clearly show that a Magisterial inquiry is to be held only to come to a prima facie conclusion as to whether a case against the petitioner for facing trial in the indictment in pursuance whereof a request for extradition has been received, is made out or not. An inquiry admittedly has a different connotation than the "trial" as is clear from the definition of the "inquiry" as given in Criminal Procedure Code, I section 4(k), whereof defines the word "inquiry" as under:--***
>
> > ***"Inquiry: includes every inquiry other than a trial conducted under this Code by Magistrate or Court."***
>
> ***Arguments addressed by the learned counsel for the petitioner to the effect that inquiry has to be held in accord with commitment proceedings, is not supported by the provisions of section 8 of the Extradition Act, 1972 read with Article 9 of the Treaty which provides that the inquiry has to be held in accord with the law of the country which is to pass an order of extradition. By virtue of section 9 of the Act, authenticated documents which have been relied upon by the learned Enquiry Officer as well as the respondents for recording of the report and passing of the impugned order have been made per se admissible and, therefore, on the basis of that material learned Enquiry Officer has rightly held that there is a prima facie case against the accused for directing them to face trial. Similarly, the respondents have also rightly held that it is a fit case for passing of an order of extradition."***

As mentioned above, the said judgment was upheld by the Hon'ble Supreme Court of Pakistan in the case of Nasrullah Khan Henjra Vs. Government of Pakistan *(supra)*.

49. We have also observed that in the case of Muhammad Asim Malik Vs. Anwar Jalil (PLD 1989 Lahore 279), quoted in the impugned judgment, it was held *inter alia* as follows:-

> ***"As said above, objections of the petitioner related to absence of a prima facie case for surrender of the fugitive offender; defects in the inquiry and its results and personal non-hearing by the Federal Government. Extradition is a special branch of law dealing with a special subject. Therefore, provisions of section 9 in so far as they allow the evidence of exhibits, depositions, statements on oath, duly authenticated in the manner provided therein to be received in the inquiry are an exception to the general procedure laid down in the Code of Criminal Procedure and the Evidence Act, 1872 Qanun-e Shahadat, 1984. Having regard to the object underlying the law of extradition and its kind and nature, the inquiry conducted by a Magistrate to find out the existence or otherwise of a prima facie case could not be equated with a regular trial by a Court of law. Therefore, the***

> ***argument of the learned counsel for the petitioner that the provisions in Qanun-e-Shahadat prohibiting the reception of a particular kind of evidence, at inquiry, must prevail over the special provisions in the Extradition Act, with respects to him, is not correct and we see no force in it. At this stage, it may be observed that as to authentication of documentary evidence, learned counsel for the petitioner raised no dispute."***
> **(Emphasis added)**

50. In the case of Kamlesh Babulal Aggarwal Vs. Union of India (2008 (104) DRJ 178), it was observed as follows:-

> ***"In our opinion, the power of the Magistrate in conducting an inquiry under Section 7 of the Act is akin to framing of the charge under Section 228 of the Code of Criminal Procedure. The requirement of Section 228 also is of a prima facie case. If the court is satisfied that a prima facie case is made out for proceeding further (trial), then a charge has to be framed. The sifting of evidence at this stage is permissible only for a limited purpose to find out a prima facie case but the court cannot decide at this stage that the witness is reliable or not."***

51. It now needs to be determined whether the evidence brought before the Enquiry Magistrate was sufficient to arrive at a finding that a *prima facie* case for appellant No.2's extradition to USA had been made out. In his affidavit, George D. Turner deposed that he had been employed by the United States Department of Justice as an Assistant United States Attorney for the Southern District of New York, and that he had been assigned to the Terrorism and International Narcotics Unit. As a Federal Prosecutor, the said deponent's duties are to prosecute persons charged with criminal violations of the laws of the United States and is responsible for preparation and prosecution of criminal cases. He further deposed that he is familiar with the charges and the evidence in the case of "United States Vs. Talha Haroon" pending in the United States District Court of the Southern District of New York. The prosecution in the said case is stated to have arisen from an investigation by the F.B.I., which revealed that in or about April 2016, appellant No.2 plotted to carry out coordinated terrorist attacks in New York City.

52. Furthermore, George D. Turner deposed that encrypted electronic communications between appellant No.2 and an undercover law enforcement officer ("U.C."), and between the C.C. and the U.C. demonstrated that appellant No.2 and the C.C.

supported I.S.I.L. and were planning to carry out coordinated terrorist attacks for and in the name of I.S.I.L. in New York City. It was also deposed that in May 2016, appellant No.2 and the C.C. took steps in preparation for executing the planned attacks. The C.C. is said to have purchased bomb-making materials, shipped them to the U.C. in the United States and helped to secure a cabin within driving distance of New York City to use as a base for making the bombs and staging the planned attacks. Additionally, it is deposed that based on communications with the U.C., appellant No.2 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 USA for the purpose of carrying out the attacks. Appellant No.2 and the C.C. are said to have identified New York City's subway system, Times Square, and particular concert venues, among other locations, as primary targets of the attacks. The evidence in the case is said to include electronic communications between appellant No.2 and the U.C. and between the C.C. and the U.C. as well as the testimony of law enforcement agents and records documenting the purchase by the C.C. of bomb-making materials on the internet and shipping those materials to the U.C. in USA for use in the planned attacks with appellant No.2. It is also deposed that the evidence demonstrates appellant No.2's participation in the plot to carry out the said terrorist attacks in New York City for and in the name of I.S.I.L.

53. The affidavit of Oscar M. Gifford was also produced before the Enquiry Magistrate. In his affidavit, Oscar M. Gifford deposed *inter alia* that his affidavit was based in part on his conversations with law enforcement agents and other people and his examination of the reports and records. It was also deposed that since the affidavit was being submitted for the limited purpose of establishing probable cause, it did not include all the facts that he had learnt during the course of his investigation. Oscar M. Gifford, in his affidavit, also deposed that on 01.05.2016, the C.C. told the U.C. that he would tell the Pakistani to contact the U.C. The C.C. is

then said to have sent a photograph to the U.C. depicting an unknown male who is said to have been identified as *"the Pakistani"* by the C.C. In the said affidavit, Mr. Gifford deposed that he believes that reference to *"the Pakistani"* by the C.C. was a reference to appellant No.2.

54. We have gone through Oscar M. Gifford's affidavit with interest and keenness and have noticed that substantial reliance has been placed on the information provided to him by the U.C. It is the U.C. who was stated to have been in communication with appellant No.2 who was alleged to have expressed his desire to participate in the plot to attack New York City. On 01.05.2016, the U.C. is said to have asked appellant No.2 if he wanted to participate in the operation to attack New York City and appellant No.2's response was that *"Insha Allah akhi I just need a ticket once it's done I'll be on my way there."* Appellant No.2 is also said to have told the U.C. that *"the path of jihad is something very rare in this century and it's a huge blessing for us to be part of it."* The C.C. is also said to have informed the U.C. on 03.05.2016 that the other participants in the plot to carry out terrorist attacks in New York City would be him and *"the Pakistani guy [i.e., Haroon]."* The C.C. is also said to have informed the U.C. that the expenses to be incurred by the C.C. included US Dollars 850 for buying a plane ticket for the Pakistani guy. Appellant No.2 is also said to have contacted the U.C. on/or about 05.05.2016 and engaged in communications with the U.C. wherein appellant No.2 is said to have informed the U.C. that he would be flying directly from Pakistan to New York City to meet up with the U.C. in the month of Ramadan. Appellant No.2 is also stated to have informed the U.C. that there can be three participants in the attack. Appellant No.2 is also said to have expressed his belief that the operation would be a success. Appellant No.2 is also said to have discussed with the U.C. the necessary supplies and methods for making explosive devices for use in the attack on New York City. Appellant No.2 is also said to have asked the U.C. whether he and the C.C. had guns and to be careful in buying the supplies and necessary ingredients. Appellant No.2 is also said to have informed the U.C.

that he had a book on how to make explosives, and that he had a lot of connections on how to make explosives. On/or about 09.05.2016, appellant No.2 is said to have engaged in further communication with the U.C. regarding the execution of the plan to attack New York City.

55. It would be tedious to give details of further communications between appellant No.2 and the U.C. as contained in the affidavit but suffice it to say that Oscar M. Gifford's deposition regarding the communications between appellant No.2 and the U.C. is not of his own knowledge but information provided to him by the U.C. Therefore, the evidence referred to in Oscar M. Gifford's affidavit cannot be termed as direct evidence but hearsay evidence. This is also true as regards the affidavit of George D. Turner.

56. Under Article 9 of the Extradition Treaty between Pakistan and the United States, extradition of a fugitive offender from Pakistan can only take place if the evidence produced against the fugitive offender is sufficient according to the laws of Pakistan to justify his committal for trial in case the crime or offence had been committed in Pakistan. For the purposes of clarity, Article 9 of the said Treaty is reproduced herein below:-

> ***"ARTICLE 9. The extradition shall take place only if the evidence be found sufficient, according to the laws of the High Contracting Party applied to, either to justify the committal of the prisoner for trial, in case the crime or offence had been committed in the territory of such High Contracting Party, or to prove that the prisoner is the identical person convicted by the Courts of the High Contracting Party who makes the requisition, and that the crime or offence of which he has been convicted is one in respect of which extradition could, at the time of such conviction, have been granted by the High Contracting Party applied to."***

57. In the case of Nasrullah Khan Henjra Vs. Government of Pakistan (PLD 1994 SC 23), the Hon'ble Supreme Court, after making reference to Article 9 of the Extradition Treaty between Pakistan and United States, held that the said Article was an important safeguard against extradition on slender grounds, for while forwarding his opinion on the question whether a *prima facie* case has been made out or not against the fugitive offender, the Enquiry Magistrate seized of the proceedings has to see if the

evidence laid before him would be admissible and sufficient to justify committal under the laws of Pakistan.

58. We appreciate that there is a need for the identity of the U.C. not to be disclosed since the subject matter of the criminal complaint (16 Mag. 6132) before the United States Magistrate for the Southern District of New York is of a highly sensitive nature. However, the affidavit of the U.C. (without his identity being disclosed therein) sworn in accordance with the requirements of Section 9(2) of the 1972 Act would be most instructive in the extradition proceedings before the Enquiry Magistrate. At this stage, it is apt to refer to the judgment of the Hon'ble Supreme Court in the case of Nasrullah Khan Henjra Vs. Government of Pakistan *(supra),* wherein the depositions or statements of two persons who had direct dealings with the fugitive offender for the purpose of smuggling heroin to USA had not been produced before the Enquiry Magistrate. In the said case, reliance had been placed on the affidavit of an Assistant Attorney who had met and examined the two persons. The Hon'ble Supreme Court in the said case observed that what the Assistant Attorney deposed with regard to the statements of the two persons would be rejected in Pakistan as hearsay evidence. It was also held that the Enquiry Magistrate could not have based his findings with regard to the existence of a *prima facie* case against the fugitive offender on the affidavit of the Assistant Attorney. For the purposes of clarity, the relevant extract in paragraph 11 of the said report is reproduced herein below:-

> ***"11. As already stated, the case of Nasrullah Khan Henjra is distinguishable from that of the other petitioners. It appears from the evidence placed before the learned Magistrate that there were two persons, described as C-1 and C-2, who had direct dealings with him for the purpose of smuggling heroin in the United States. The requisitioning Government did not produce the depositions or statements made by these witnesses. On the other hand, it relied upon the affidavit of one of its Assistant Attorneys who had met and examined them. Quite obviously what the Assistant Attorney deposed with regard to the statements made by C-1 and C-2 would have been rejected in Pakistan as hearsay evidence. The learned Magistrate could not have therefore based his findings with regard to the existence of a prima facie case against Nasrullah Khan Henjra on his affidavit."***

59. In the said case, since Khawaja Imtiaz Ahmad, learned Deputy Attorney General had taken the position that the depositions of the two persons were available and could be produced before the Enquiry Magistrate, the Hon'ble Supreme Court set-aside the report of the Enquiry Magistrate regarding the extradition of the fugitive offender and remanded the matter to the Enquiry Magistrate for a decision afresh. It may be mentioned that in the post-remand proceedings before the Enquiry Magistrate, the depositions of the two witnesses were given in evidence after which the Enquiry Magistrate, in its report, concluded that there was a *prima facie* case against the fugitive offender whose extradition has been sought to the United States. The conclusion of the Enquiry Magistrate was held up to the Hon'ble Supreme Court of Pakistan in the judgment reported as Nasrullah Khan Henjra Vs. Government of Pakistan (1998 SCMR 1072).

60. Consistent with the judgment of the Hon'ble Supreme Court in the case of Nasrullah Khan Henjra Vs. Government of Pakistan (PLD 1994 SC 23), we are of the view that the Enquiry Magistrate could not have recommended appellant No.2's extradition on the basis of the hearsay evidence in the affidavits of George D. Turner and Oscar M. Gifford. Perusal of the Enquiry Magistrate's order dated 16.01.2017 shows that in holding that there was *"sufficient incriminatory evidence"* on the record to conclude that a *prima facie* case had been made out for appellant No.2's extradition, he had not paid heed to the requirements of Article 9 of the extradition treaty between Pakistan and USA as well as the law laid down by the Hon'ble Supreme Court in the case of Nasrullah Khan Henjra Vs. Government of Pakistan *(supra)*.

61. The learned Deputy Attorney General submitted that he was in liaison with the Embassy of the USA on this matter and that vide e.mail dated 22.07.2020, he had been informed that the prosecutors in New York had been consulted and that the necessary evidence would be provided to the Enquiry Magistrate.

62. Now, under Section 8(2) of the 1972 Act, the Enquiry Magistrate is also required to take evidence to show that the offence which the fugitive offender is accused of or alleged to have

been convicted for is not an extradition offence. Bearing in mind the requirements of Section 8(2) *ibid*, we are of the view that the Enquiry Magistrate's order must show as to whether the fugitive offender is alleged to have been accused of or convicted for committing an extradition offence. In Section 2(1)(a) of the 1972 Act, an extradition offence has been defined as follows:-

> ***"(a) "extradition offence" means an offence the act or omission constituting which falls within any of the descriptions set out in the Schedule and, if it took place within, or within the jurisdiction of, Pakistan would constitute an offence against the law of Pakistan and also***
>
> ***(i) in the case of a treaty State, an offence a person accused of which is, under the extradition treaty with that State, to be returned to or from that State; and***
>
> ***(ii) in the case of a foreign State not being a treaty State, an offence specified in a direction issued under section 4."***

63. Since we intend to remand the matter to the Enquiry Magistrate so as to afford an opportunity to the prosecution to produce the affidavit/deposition of the U.C. (without disclosing his identity), made in accordance with Section 9(2) of the 1972 Act, we deem it appropriate also to direct the Enquiry Magistrate to give a finding on the question whether conspiracy to commit acts of terrorism (i.e. the offence which appellant No.2 is alleged to have committed) is an extradition offence so as to attract the provisions of the 1972 Act.

64. In view of the above, I.C.A.No.225/2019 filed by the appellants is dismissed whereas I.C.A.No.224/2019 filed by the respondent is partly allowed; the impugned judgment dated 03.05.2019 to the extent of holding that it is necessary for the enquiry/investigation officer in the requesting State who inquired or investigated the case against the fugitive offender to appear and give evidence before the Enquiry Magistrate is set-aside; the observation in the impugned judgment that for the affidavits produced in support of the extradition request to have evidentiary value, the deponents of such affidavits have to be produced for cross-examination is also set-aside; the proceedings before the Enquiry Magistrate shall be deemed to be pending and in such proceedings, the Enquiry Magistrate may accept any further

evidence that is produced in support of the extradition request in accordance with Section 9 of the 1972 Act. There shall be no order as to costs.

(AAMER FAROOQ)
JUDGE

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____/2020

(JUDGE) **(JUDGE)**

Qamar Khan

APPROVED FOR REPORTING