

Form No: HCJD/C-121.

**ORDER SHEET**

**IN THE ISLAMABAD HIGH COURT, ISLAMABAD**  
**JUDICIAL DEPARTMENT**

**Crl. Misc. No. 442-B of 2014**

Muhammad Shafique Butt and another  
**Vs**  
The State, etc.

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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03)      **05-8-2014.**      Mr Ilyas Siddiqui Advocate, for the petitioners.  
Malik Faisal Rafique, Deputy Attorney General.  
Mr Khalid Mehmood Awan, SHO P.S. Aabpara.  
Mr Abdur Razzaq, S.I/O, P.S. Aabpara.

Through instant petition Muhammad Shafique Butt s/o Abdul Qadir Butt and Muhammad Nasir s/o Muhammad Manzoor, have sought post arrest bail in case FIR No. 234 dated 27-5-2014, registered under Sections 500, 501, 504 & 505(ii) of the Pakistan Penal Code, 1860, at Police Station Aabpara (Islamabad).

2.              Briefly stated facts of the case, as narrated in FIR, are that FIR No. 234 dated 27-5-2014, was registered under Sections 500, 501, 504 and 505 (ii) of Pakistan Penal Code (hereinafter referred to as “PPC”)on the report of Azhar Mehmood S.I. Police Station Aabpara, Islamabad against unknown accused. It was reported that the complainant during routine patrolling observed banners on display, on which, allegedly, defamatory material was inscribed against an Honourable sitting Judge of the Supreme Court. In the course of investigations, petitioner No.2 was arrested on 27-05-2014, alleged to have been seen by two witnesses while displaying the said defamatory banners. It is an admitted fact that the accused is a juvenile, aged 16 years and employed as a labourer with petitioner No.1. Petitioner No.1 is engaged in the business of printing/painting banners and has established a shop under the name of “Shafique Sign Services” located at Banni/Rawalpindi. He was also arrested on the

same date. According to the statement of Petitioner No.1 the order for making the banners had been placed by one Rashid, who was also arrested on 01-7-2014. The Report U/S 173 of the Criminal Procedure Code, 1898 (hereinafter referred to as Cr.P.C.) was submitted before the Trial Court on 09-6-2014.

3. Petitioners No. 1 & 2, applied for post arrest bail, which were dismissed vide order dated 12-6-2014 and 01-7-2014 respectively.

4. Learned counsel for the petitioners contends that three out of the four offences i.e. sections 500, 501 and 504 PPC fall within the non-prohibitory clause, while section 505(ii) PPC should not have been invoked in the present case. The learned counsel further contends that the bail petitions had been dismissed by the learned Additional Sessions Judge (West) Islamabad on the sole ground that the offences amounted to maligning, defaming and ridiculing the institution of the judiciary, while simultaneously admitting that the offences fall under the non-prohibitory clause of Section 497 Cr.P.C. In all fairness, the learned Counsel has also pointed out that Section 505(2) PPC, which though not applicable in this case, was not even considered by the learned Additional Sessions Judge while deciding the bail petition. It is argued that the above mentioned sole ground, which has persuaded the learned Addl. Sessions Judge to refuse bail in a case of offences falling within the non-prohibitory clause, should not have been considered as making the case extraordinary or exceptional, so as to ignore the established rule of considering bail favourably in such cases. Furthermore, it is contended that criminal proceedings in a case of defamation can only be initiated on the complaint of the person or institution against whom the alleged defamatory material has been made public. The offences relating to defamation are person specific and transaction specific. Therefore, an FIR could not have been registered on the complaint of a Sub Inspector and hence, the entire proceedings are coram non-judice. Reliance is placed on *Mir Shakeel-ur-Rehman Versus Yahya Bakhtiar and others* (PLD 2010 S.C. 612), *Imran Versus The State* (2011 P Cr. L J 865), *Muhammad Ali Kazi and another Versus The State and 3 others*

(1994 P Cr. L J 430), Abdul Aziz Versus The State (1993 MLD 2045). The learned counsel submits that the petitioner No. 2 is an illiterate employee of petitioner No. 1 and a juvenile, as he is sixteen years of age. Regarding petitioner No. 1, it is submitted that he is also innocent, as he had made the Banners in the normal course of business on the orders of the main accused. Lastly, the learned counsel has stressed with vehemence that the ground for rejection of the respective bails has prejudiced the right to a fair trial of the two accused, by treating the offences as having been committed against the institution of the judiciary, while no such allegation is mentioned in the FIR.

5. On the other hand, the learned Deputy Attorney General appeared alongwith M/s Khalid Mehmood Awan (Inspector) and Muhammad Razzaq (Sub Inspector). It was contended that a report under Section 173 of the Cr.P.C. has been submitted, stating that the FIR was registered to protect the repute of the institution, and therefore bail was rejected. However, no plausible explanation was given for invoking Section 505(2) of the PPC in the present case; rather, it was candidly admitted that the same was not relevant.

6. With the able assistance of the learned counsel for the parties, the record has been perused, and after careful consideration, the findings of this Court are as follows.

7. The plain reading of the FIR and the record does not reveal that on the facts of the case, Section 505(2) PPC would be attracted, so as to bring the case within a prohibitory clause of Section 497 Cr.P.C. In any case, it has been contended by the prosecution that it is not relevant.

8. The other offences included in the FIR i.e. Sections 500, 501 and 504 of the PPC are admittedly of the category which fall within the non-prohibitory clause of Section 497 Cr.P.C. By now the law and principles for granting bail in such cases are well settled. It is important to note that in the case of Zafar Iqbal Versus Muhammad

Anwar and others (2009 SCMR 1488), a larger Bench of the Honourable Supreme Court has elucidated the principles for considering the grant of bail, where offences fall within the non-prohibitory clause. In the light of the said principles it has been held that where offences fall within the non-prohibitory clause, the granting of bail has to be considered favourably as a rule, but may be declined in exceptional cases. Examples, though not exhaustive, of such extraordinary and exceptional cases have further been listed as follows:

- i) Where there is likelihood of abscondance of the accused;
- ii) Where there is apprehension of the accused tampering with the prosecution evidence;
- iii) Where there is danger of the offence being repeated, if the accused is released on bail; and
- iv) Where the accused is a previous convict.

9. The Hon'ble Supreme Court of Pakistan reaffirmed and reiterated the principles as laid down in the earlier judgments of Subhan Khan Versus the State (2002 SCMR 1797) and Tariq Bashir and five other vs The State (PLD 1995 SC 34). The said principles have been consistently followed. Reliance may also be placed on the case of Riaz Jafar Natiq Vs. Muhammad Nadeem Dar and others (2011 SCMR 1708).

10. In the light of the principles laid down in the above mentioned cases, the learned Additional Sessions Judge ought to have considered the principle of granting of bail favourably as a rule, rather than being influenced or swayed by the nature of the allegations, which, in my humble opinion, tantamount to pre-judging the case and treating the offences beyond the scope determined by the legislature. When the legislature has clearly intended to make the offences under Sections 500, 501 and 504 PPC as falling within the non-prohibitory clause of Section 497 Cr.P.C., it is beyond the jurisdiction or power of the Courts to take a contrary view. This Court therefore concludes, that following the principles laid down by the Honourable Supreme Court, both the petitioners are entitled to being granted bail.

11. The other contentions raised by the learned counsel relate to the merits and, therefore, it is not appropriate to advert at the bail stage. However, the apprehensions of the learned counsel regarding the denial of a fair trial, emanating from the ground of rejection of bail, which weighed with the learned Additional Sessions Judge, requires the attention of this Court and cannot be ignored.

12. The learned Addl. Sessions Judge took the view that “the nature of the offences make it clear that the same was aimed at maligning, defaming and ridiculing the entire institution of judiciary.”

13. The contention of the counsel that the view taken and expressed by the learned Judge while dismissing the respective bails has led the accused to believe that the right to a fair trial will be denied to them, as the allegations are being considered by the Courts as offences against the institution of the judiciary as a whole, is certainly plausible. Though in reality it may not influence the Courts or the proceedings, but justice must not only to be done but must be seen to be done. Any perception of impartiality or bias, even if not a reality, would certainly prejudice the right to a free trial of any accused. Confidence in the court and assurance of a fair trial is a prerequisite for the dispensation of justice, and pivotal for creating public confidence and trust in the judiciary. Independence of Judiciary entails that the trial or adjudication is through Courts which are competent, independent and impartial. The duty of the Courts to maintain this public confidence and independence can only be achieved when it not only ensures a fair trial but also creates an environment and perception of a fair trial.

14. The Courts are always faced with a daunting challenge to be seen as conducting a fair trial, where the criminal charge involves allegations against an accused which related to a sitting Hon’ble Member of the Bench. Not only actual bias but the perception of bias would also raise questions regarding the impartiality of the Court and thus prejudice a fair trial. Bias is the overriding factor for ascertaining a

Court's impartiality. Questions regarding bias may be raised, if the Court makes it evident through its conduct, observations, opinions or otherwise that it has a stake in the proceedings. It would be perceived or appear that the bias will ultimately weigh while concluding the trial, therefore raising questions about impartiality. With regard to criminal charges, it is an established law that a person is presumed to be innocent until proved guilty and the guilt can be proved only on the touchstone of proof beyond a shadow of doubt.

15. Even before the right to due process and fair trial was codified as a fundamental right by the insertion of Article 10-A in the Constitution, the Hon'ble Supreme Court of Pakistan consistently emphasized and stressed the quest for justice, through strictly observing the principles of a fair trial. The right to a fair trial and due process have been declared as the corner stone of the administration of justice, in the sense that regardless of the nature of the allegations, every accused will be entitled to the due process of law and will be presumed innocent until proven guilty. It has been held that bias vitiates the proceedings if such circumstances are created by the Court. It would not be out of place to refer to the observations of Lord Denning M.R. in *Metropolitan Properties Co. (F.G.C.) Ltd. V. Lannon and others* (1968) 3 All ER 304, as endorsed by the Honourable Supreme Court and quoted with approval in the landmark judgment on bias in the case *Asif Ali Zardari Versus the State*, PLD 2001 S.C. 568. The same is as follows:

*"It brings home this point; in considering whether there was a real likelihood of bias, the Court does not look at the mind of the justice himself or at the mind of the Chairman of the Tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he should, or did, in fact favour one side at the expense of the other. The Court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless, if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand."*

There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would or did favour one side unfairly at the expense of the other. The Court will not enquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking: 'The judge was biased'."

16. Similarly, the Indian Supreme Court in *Zahira Habibullah H. Sheikh V. State of Gujarat and others* (2004) 4 Supreme Court Cases 158 has observed as follows:

*"Each one has an inbuilt right to be dealt with fairly in a criminal trial. Denial of a fair trial is as much injustice to the accused as is to the victim and the society. Fair trial obviously would mean a trial before an impartial judge, a fair prosecutor and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated. If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial. The failure to hear material witnesses is certainly denial of fair trial."*

It is also important to quote from the same judgment, as under:

*"Though justice is depicted to be blindfolded, as popularly said, it is only a veil not to see who the party before it is while pronouncing judgment on the cause brought before it by enforcing law and administering justice, and not to ignore or turn the mind/attention of the court away from the truth of the cause or lis before it, in disregard of its duty to prevent miscarriage of justice. Courts have always been considered to have an overriding duty to maintain public confidence in the administration of justice -- often referred to as the duty to vindicate and uphold the "majesty of the law".*

17. The courts conducting fair trial ought to seek guidance and strictly observe the principles laid down by the Honourable Supreme Court, inter alia, in the judgments rendered in the cases of Sarfraz Saleem Versus Federation of Pakistan and others (PLD 2014 S.C. 232), Suo Motu Action (PLD 2012 S.C. 664), Contempt proceedings against Syed Yousaf Raza Gillani, the Prime Minister of Pakistan regarding non-compliance of Supreme Court's order dated 16-12-2009 (PLD 2012 S.C. 553), Nazeer alias Wazeer Versus The State (PLD 2007 S.C. 202), Asif Ali Zardari and another Versus The State (PLD 2001 S.C. 568), Ch. Muhammad Ashraf Gujjar and others Versus Malik Riaz Hussain and others (2013 SCMR 161), Babar Hussain Shah and another Versus Mujeeb Ahmed Khan and another (2012 SCMR 1235), Ahmed Omar Saeed Shaikh and 3 others Versus The State (2002 SCMR 1562).

18. Based on what has been stated above, the view taken and expressed by the learned Judge in dismissing the bail applications has rightly raised concerns and questions regarding bias and impartiality. Without realizing, the learned judge through his views has expressed, that his Court and all other forums under the institution of the judiciary are stake holders in the proceedings pending against the two petitioners and therefore, has prejudiced their right to a fair trial. The Courts are conscious that public confidence and trust solely depends on the assurance of a fair trial. This onerous task becomes far greater when confronted with a situation when the trial involves an accused charged with allegations against an Honourable Judge. It is probably the wisdom of the legislature that no specific offence falling within the prohibitory clause has been included in the PPC; rather, under a special law i.e. Contempt of Court Ordinance, 2002 it has been exclusively left to the courts to convict/punish an alleged contemnor for maligning, ridiculing or bringing into disrepute the courts or a judge. The bar of conduct has also been raised to such an extent for a judge that no perception could be created of bias or impartiality.



Bias or impartiality is a disqualification for any person holding the revered position of a judge who is bestowed with the power to adjudicate disputes, protecting lives and also taking lives by awarding death sentences. Amongst all the codes of conduct that have been prescribed, probably the one most illustrative and placing a stringent bar is mentioned in the Hedaya, a compilation of the opinions of Shariah by Imam Abu Hanifa and other Mujtahideens, the relevant portion being as follows:

*"He must not give judgment at a time when his understanding is not perfectly clear and unbiased- The Kazee must not give judgment when he is hungry or thirsty, because such situations diminish the intellect and understanding of the person affected by them. Neither must he give judgment when he is in a passion, or when he has filled his stomach with food, because the Prophet SAW has said "Let not a magistrate decide between disputants when he is angry or full"*

19. Such a degree of conduct is solely for the purposes of ensuring a fair trial and due process. Bias, therefore, even if it is in favour of one's own institution, vitiates the proceedings, as the trial is no longer fair and the Judge appears to be "acting as a Judge in his/her own cause". In order to assure the present accused or any other litigant, it is imperative to demonstrate that the trial is not only fair but ought to be seen as fair. The judges of District Courts must have the confidence and belief that each one of them, while dispensing justice, has the same status as any other Honourable Judge of the Supreme Court or a High Court. It is their duty to ensure fair trial without being influenced or swayed by the persons involved in the cause before them. While presiding a Court they must be conscious that they are not subordinate to anyone. Independence of judiciary is measured by the conduct of the presiding

judge in guaranteeing the right to fair trial and giving decisions without fear or favour.

20. This Court appreciates the honest and proper assistance rendered by the learned Deputy Attorney General, inter alia, in admitting that section 505 (2) of PPC is not applicable in this case. The learned members of the Bar and the prosecution have the same degree of responsibility and duty as a Court or a Judge in creating an atmosphere for assuring to the litigants the right to fair trial. So as not to prejudice the merits of the case or the proceedings before the trial court, this Court restrains itself from making any observation regarding the initiation of the criminal proceedings. However, it may be mentioned that before initiating proceedings relating to alleged defamation of an Honourable sitting Judge, propriety required that permission of the Registrar of the concerned Honourable Court should have been solicited. It would be sufficient to emphasize the importance of the role of the prosecution in protecting the right to fair trial by quoting from the judgment of the Honourable Supreme Court in case of Ch. Muhammad Ashraf Gujjar & others V. Malik Riaz Hussain & others (2013 SCMR 161) held as under:

*"The job of the prosecutor is so important that it cannot be allowed to be tinged or tainted with bias. An element of bias in any corner of his mind, can vitiate the whole process. An Advocate or a person appearing in defence can strike left and right and even get away with bias but a speck of bias on the part of the prosecutor can work havoc in the process. If he is biased in favour of the Court, fair trial would be reduced to an impossibility. If he is biased in favour of the respondent, dignity of the Court would be thrown down the drain"*

21. The trial Court is, therefore, directed not to be influenced by the observations made by the learned Judge while dismissing bails and proceed strictly in accordance with law and principles of a fair trial, inter alia, as discussed above.

22. In the light of the above discussion, the instant petition is accepted and the petitioners/accused are admitted to bail. In case of petitioner No.1, he shall be released on bail, subject to furnishing bail bonds in the sum of Rs.200,000/- (rupees two lacs only) with two sureties in the like amount to the satisfaction of the learned trial Court. While petitioner No.2, being a sixteen years old employee shall be released on bail subject to furnishing personal bond in the sum of Rs.50,000/- (rupees fifty thousands only) to the satisfaction of the learned trial Court.

23. It is further directed that the trial shall be concluded without delay within a period of three months. The I.O concerned shall ensure that the witnesses are produced before the trial Court for an early conclusion of the trial.

**(ATHAR MINALLAH)**  
**JUDGE**

*Approved for reporting.*

**JUDGE**