

JUDGMENT SHEET

PESHAWAR HIGH COURT, ABBOTTABAD BENCH

JUDICIAL DEPARTMENT

Cr. Revision Petition No.31-A of 2014

JUDGMENT

Date of hearing.....30/11/2017.....

*Petitioner(s) ...(Muhammad Arif) by Mr. Muhammad Wajid Khan,
Advocate.....*

*Respondent(s)...(The State etc)...by Sardar Muhammad, Asif,
Assistant Advocate General*

SYED MUHAMMAD ATTIQUE SHAH, J.-

Muhammad Arif, petitioner, invoked the revisional jurisdiction of this Court under section 439 Cr.P.C by filing the instant criminal revision petition challenging validity of order dated 05.07.2014 passed by learned Additional Sessions Judge-IV, Mansehra, whereby, application of the petitioner for his exemption from personal appearance before the trial Court, in case FIR No.315 dated 05.11.2012 under section 337-F(ii)/337-A(ii)/336/34 PPC, Police Station Battal, was dismissed. The petitioner has prayed that:

“On acceptance of instant revision petition, the order of learned Additional Sessions Judge-IV, Mansehra, may kindly be set-aside

and exemption may kindly be granted to the petitioner from personal appearance and his attendance may kindly be marked through counsel.”

2. Brief facts of the case leading to the filing of present revision petition are that petitioner alongwith his father and brother was charged in case FIR No.315. After completion of investigation, challan was submitted before the learned trial Court, where charge was framed against the accused including the petitioner. During trial, petitioner moved an application for his exemption from personal appearance through his counsel, which was turned down by the learned trial Court/Additional Sessions Judge-IV, Mansehra vide order dated 05.07.2014, hence, the instant revision petition for the same relief.

3. Learned counsel for the petitioner contended that the learned trial Court without considering the prevailing circumstances turned down the application of the petitioner for his exemption from personal appearance and he argued that the order of the learned trial Court is not in accordance with the law on the subject. In support of his arguments, learned counsel for petitioner placed reliance on **Shah**

Zaman's case (PLD 1993 Peshawar 155) and **Dr. Ali Yahya's case** (1989 P.Cr.L.J 1652) and prayed for setting aside the order of learned trial Court and granting exemption to the petitioner from personal appearance on acceptance of his revision petition.

4. Conversely, learned Assistant Advocate General, while controverting the contentions of learned counsel for the petitioner inter alia contended that exemption from personal appearance could not be granted to the petitioner in his absence. He submitted that the august Apex Court in case titled '**Haji Aurangzeb Vs. Mushtaq Ahmad and another**' (PLJ 2004 SC 533) has distinguished the case law relied upon by the learned counsel for the petitioner.

5. Arguments of learned counsel for the petitioner and learned Assistant Advocate General heard and available record perused with their able assistance.

6. Perusal of record reveals that petitioner, Muhammad Arif, alongwith other co-accused was charged in case FIR No.315 under sections 337-F(ii)/337-A(ii)/336 PPC of Police Station Battal. It is evident from record of the case that charge against the accused was framed on 05.01.2013. It may be

mentioned here that an application was moved on 01.06.2013 on behalf of petitioner Muhammad Arif alongwith co-accused Muhammad Riaz and Muhammad Arshad for their exemption from personal appearance on the ground that petitioner and accused Muhammad Riaz were student of Matric in Government High School, Jalgali and accused Muhammad Arshad was getting education in 'Madrassa'. Thereafter, accused/petitioner Muhammad Arif remained present on each date of hearing till 15.02.2014. However, on 29.03.2014 petitioner was absent and an application for his exemption from personal appearance was moved by his counsel on the ground that he had gone to Karachi for earning livelihood. The learned trial Court allowed the said application for that day only. As the petitioner could not appear before the learned trial Court on next date of hearing, notice of application dated 01.06.2013 already placed on file was given to the other side. Consequently, the learned trial Court dismissed the said application to the extent of petitioner, Muhammad Arif on the ground that under the law petitioner was required to have present before the trial Court.

7. No doubt, trial could be held in absence of an accused in certain cases, as envisaged in section 540-A Cr.P.C. For the sake of ready reference, the said provisions are reproduced below:

“540-A. Provision for inquiries an trial being held in the absence of accused in certain cases. (1) At any stage of an inquiry or trial under this Code, where two or more accused are before the court, if the Judge or Magistrate is satisfied for reason to be recorded, that any one or more of such accused is or incapable of remaining before the Court, he may, if such accused is represented by a pleader, dispense with his attendance and proceed with such inquiry or trial in his absence, and may, at any subsequent stage of the proceedings, direct the personal attendance of such accused.

(2) If the accused in any such case is not represented by a pleader, or if the Judge or Magistrate considers his personal attendance necessary, he may, if he thinks fit, and for reasons to be recorded by him either adjourn such inquiry or trial, or order that the case of such accused be taken up or tried separately.”

It is very much obvious that the grant of exemption to an accused from his personal appearance during the trial is discretionary in nature and it depends upon the satisfaction of the Judge regarding his incapability of remaining before the Court. It is clear from the abovementioned provisions of law that accused must be before the Court at the time of seeking exemption from his personal appearance during the trial. It has

been clearly held in Haji Aurangzeb's case (Supra)

that:

“It is clear to us that none of the relied upon precedent cases support the wild proposition canvassed by learned counsel before us. We will, therefore, conclude that normally the accused has to be physically present in the Court for claiming exemption and that if the Court is satisfied about his incapability of remaining before the Court, the Court may proceed to grant exemption. Incapability is word of wide import and may cover all circumstances beyond the control of the accused. The exemption could be granted in absence in extremely exceptional cases like ailment of accused which rendered his movement difficult (like the case of paralysis) or departure from country or station is absolutely necessary and there is no time to have recourse to the Court for seeking permission/exemption. It may be observed that the provision i.e. Section 540-A Cr.P.C covered cases of temporary exemption from one or two dates of hearing or exemption till the conclusion of inquiry/trial. The Courts have to pass appropriate orders depending on the facts and circumstances of the case.”

In the instant case, application for exemption was filed by the petitioner on 01.06.2013 and exemption was sought by him on the ground that he was student of Matric in Government High School, Jalgali. Subsequently, the petitioner, without getting decision of said application, left for Karachi for earning his livelihood and remained absent from the Court till 05.07.2014. It is important to note that on 29.03.2014 another application for exemption of petitioner was filed in his absence which was allowed only for that

date, however on subsequent dates, he failed to appear before the learned trial Court and thus on 10.06.2014 NBWA was issued against him and notice was also given to his sureties. However, he again failed to appear before the Court. Moreover, learned counsel for the petitioner could not point out any illegality or material irregularity in the impugned order of learned trial Court refusing exemption from personal appearance during the trial to the accused.

8. Thus, keeping in view the above facts and circumstances of the case and discussion made thereupon, present criminal revision petition having without any force is dismissed.

Dt.30.11.2017.

J U D G E

M.Saleem/*