

IN THE PESHAWAR HIGH COURT,
MINGORA BENCH/ DAR-UL-QAZA

Cr. R No.55-M of 2016 with
OP No.75-M/2016.

Parvaiz Khan
Vs
The State & another.

JUDGMENT

Date of hearing _____ 11.05.2017 _____.

Appellant-Petitioner : **By Hazrat Rehman, Advocate.**

Respondent: **By Mr. Shams-ul-Hadi, Advocate.**

ISHTIAQ IBRAHIM, J--- Pervaiz Khan, the petitioner

invokes revisional jurisdiction of this court under section 435

and 439 Cr.PC with the following prayer:

“On acceptance of instant petition, the impugned order/ Judgment of lower Appellate Court dated 20.09.2016, to the extent of said grievance may kindly be set aside and the petition of petitioner dated 01.03.2016 regarding exemption may be accepted with further revival of criminal appeal No.3 of 2015, with the directions to learned lower appellate Court to hear and decide the same on merits.”

2. The petitioner has also filed connected Quashment Petition No. 75-M/2016 under section 561-A Cr.PC against the order 20.09.2016, whereby warrant of arrest against the petitioner was issued and summoned his sureties in Criminal revision No.21 of 2015, pending before the learned lower Court. Both the petitions are going to be decided through this single judgment.

3. Petitioner alongwith his co-accused namely Bilal Ahmad son of Maloom Khan were charged in case FIR No. 59 dated 25.01.2014 under section 337-A(i)/ 337-F(ii) PPC Police Talash, lower Dir. The petitioner alongwith his co-accused were tried by learned Judicial Magistrate/ Illaqa Qazi and were convicted vide judgment dated 29.10.2015 under the following heads.

- (i) Petitioner was convicted under section 337-A(i) PPC and was burdened to pay the amount of Rs. 125000/- to the complainant/ victim as Daman.
- (ii) Bilal was convicted under section 337-F(ii) PPC and was burdened to pay Rs.100000/- as Daman to the complainant/ injured.
- (iii) They were further directed to make the requisite payment after sixty (60) days.

- (iv) The petitioner alongwith ;co-accused were also directed to furnish bonds to the tune of Rs. 200000/- with two sureties for the payment of Daman in the requisite period and in case of failure of furnishing surety bonds they were ordered to be kept in jail in default to undergo one year simple imprisonment.

4. Being aggrieved the appellant assailed judgment of learned Judicial Magistrate/ Illaqa Qazi, through Criminal appeal filed in the Court of learned Sessions Judge/ Zilla Qazi Lower Dir on 20.11.2015. The State also filed revision petition for enhancement of the sentence.

5. Learned appellate court after admitting the case for regular hearing, the sentence of petitioner and co-appellant was suspended, vide order dated 02.11.2015 on the bonds already executed by them.

6. On 01.03.2016 petitioner submitted an application under section 540-A Cr.PC for his exemption on the premise that he is proceeding to Saudi Arabia and his Visa is going to expire on 10.03.2016. Certain documents were also appended with the application. On the Margin of the said

application order passed by the learned Sessions Judge is that, *“Place on relevant file and notice be given to the State/ complainant for date fixed”* After hearing the parties on 20.09.2016, the learned trial court passed the impugned order and turned down the request of exemption. In addition to that appeal against conviction to the extent of present petitioner was also dismissed on the ground that he has left the country without permission of the Court. The petitioner filed connected Quashment petition as well as Criminal revision petition for setting aside impugned judgment and by accepting exemption application, the case be remanded to decided afresh on merits.

7. Arguments heard and record perused.

8. First question before this Court would be that where the appellate Court/ Court of Session can grant exemption or not and that's too when he has been adjudged already by the competent Court of law/trial court.

9. Appellate Court enjoys the same powers which are bestowed by statute upon the trial court. In other words it

is now more than settled that appeal is continuation of trial.

Reliance is placed on case titled **“Mohtarma Benazir Bhutto, MNA, Leader of the Opposition, Bilawal House, Karachi, Vs. The State through Chief Ehtesab Commissioner” (1999 SCMR 1619)**, wherein it is held that:

“10. Mr. Aitzaz Ahsan, learned Senior Advocate Supreme Court for the appellant was right to rely on Muhammad Ashfaq alias Chief v. The State 1998 PCr.LJ 1486), to contend that in similar circumstances a Division Bench of the Sindh High Court allowed the appeal, in absentia, of Mr. Altaf Hussain, Chief of the MQM (who had been convicted of such heinous offences as under sections 592, 394 and 395, P.P.C., i.e. robbery and dacoity with force and firearms). While entertaining, hearing and accepting the appeal in the absence of the convicted appellant the learned Division Bench had observed:--

"The appeal is a fundamental right and is a continuation of proceedings. When a person can be tried in absentia, there is no reason as to why his appeal could not be heard as such."

I see no reason why a similar treatment be not meted out the appellant herein.”

10. From the above judgment the guidance can easily be inferred that the appellate court can grant exemption, as the appeal is continuation of trial, therefore, provision of section 540-A Cr.PC, is equally applicable to the case of petitioner in appeal. For resolving the question of exemption to the petitioner and to understand the intent of the law maker, the said provision is reproduced below.

540-A. Provision for inquiries and 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.

11. The petitioner submitted application to the learned appellate Court, when he was present in the country and the same was noticed to the state and complainant. In his application he was catagoric that he is proceeding to Saudi Arabia on 03.03.2016, while his Visa was due to expire on 10.03.2016, so there after he left the country. Had the position been otherwise and if he had left the country without submission of application, then of course the position would have been altogether different. When the accused/ petitioner left the country, then too his application may be considered, as physical presence of an accused before the Court is not a condition precedent for granting him exemption from appearance. Provisions relating to exemption in the Code of Criminal Procedure are, 116, 205, 540-A Cr.PC and even otherwise there is nothing in the Code of Criminal Procedure which forbade the Court for grant of exemption in the interest

of justice by keeping in view peculiar circumstances of the each and every case.

12. No doubt grant of exemption is discretion of the Court, but these being beneficial provisions or to be interpreted liberally in order to meet the ends of Justice. To give effect to form and not to the substance would certainly defeat the ends of justice and ultimately the law itself. The same would be an approach prejudicial to the system itself.

13. While dealing with the question of exemption and other ancillary matters conduct of the accused is of much relevance, therefore, it is worth mentioning here that during trial petitioner remained on exemption throughout and when he was ordered by the learned trial court to appear, he accordingly appeared before the learned trial court. It is admitted fact that petitioners were burdened only to pay Daman to the injured. In a like situation, the Hon'ble apex Court in case titled "Haji Aurangzeb Vs Mushtaq Ahmad and another "(PLD 2004 SC 533), held as under:

"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.

The provisions of section 540-A Cr.PC are also to be interpreted with benevolence, because it is an enabling provision not meant to punish some one. The section, in the circumstances, aims at achieving three fold benefit. One benefit being that of the exempted accused, second being that of he co-accused under trial and third being the convenience of the Court itself.”

14. The accused had left the country after submitting exemption application, as his visa was going to expire. For granting of exemption physical presence of an accused before the Court is not a condition precedent and the learned trial court/appellate court may exempt the accused in his absence. Reliance is placed on case titled “Tahir Muhammad Vs. Mst. Arifa another” (PLD 2003 Peshawar 123).

15. When facts of the present case and prayer of the petitioner in his application for grant of exemption are taken into consideration in view of this Court the learned appellate court has not exercised jurisdiction conferred by law properly by it.

16. Learned appellate Court dismissed the appeal on the sole ground of non-presence of petitioner, while the learned appellate court after admitting the appeal, was under legal obligation to peruse the record and dispose of the appeal on merits giving reasons in support of judgment proposed to be given even in absence of accused/ appellant therein.

Reliance is placed on case titled **“Muhamamd Ashiq Fazir Vs the State” (PLD 1970 Supreme Court 177).**

17. For the reasons discussed above, both the petitions are allowed, impugned judgment and order dated 20.09.2016 of learned Sessions Judge/Zilla Qazi Dir Lower at Timergara, are set aside, consequently criminal appeal filed before the learned appellate Court is restored, which was dismissed to the extent of appellant. Since there is revision for

enhancement of sentence filed by the state, this would be appropriate that the petitioner shall be present at the time of announcement of judgment. As the petitioner is abroad and these petitions have been filed by his counsel after obtaining power of attorney, the petitioner is directed to appear before the appellate court within four months, while appellate court shall dispose of the same at the earliest.

Announced.

11.05.2017

Azam/P.S _

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