

SUPREME COURT OF PAKISTAN

(Appellate Jurisdiction)

Present:

MR. JUSTICE AMIN-UD-DIN KHAN

MR. JUSTICE JAMAL KHAN MANDOKHAIL

(A/R)

Jail Petition No. 516 of 2018

*(Against the judgment dated
29.04.2016 passed by the High
Court of Sindh, Karachi in
Criminal Appeal No.192 of
2014)*

Muhammad Iqbal

...Petitioner (s)

Versus

The State

...Respondent(s)

For the Petitioner(s):

Mr. Zulfikar Khalid Maluka, ASC

For the State:

Mr. Sajid Ilyas Bhatti, Addl. AG Pak.

For Trading Department
Authority of Pakistan:

Syed Muhammad Hasnain Ibrahim
Kazmi, ASC
Syed Rifaqat Hussain Shah, AOR

Date of Hearing:

15.12.2021

JUDGMENT

AMIN-UD-DIN KHAN, J.- A foreign buyer Ms. Lina Bomba of M/s Jaed Textile Proprietary Limited, Sydney Australia preferred a complaint against petitioner Muhammad Iqbal i.e. owner of M/s Craft Textile Industries, Karachi for failing to timely ship an order of bath towel, with the request that the Trade Development Authority of Pakistan ("TDAP") take legal action against the latter entity. The petitioner expressed his willingness for amicable settlement but could not make good his commitment of returning the amount claimed by the foreign buyer in two installments. An inquiry conducted by TDAP revealed that the

petitioner did not ship the consignment to M/s. Jaed Textile Proprietary Limited nor refunded the amount received in advance from the foreign buyer. TDAP, therefore, filed a complaint before the Special Court (Commercial), Karachi against the petitioner, for indulging in unfair trade practices and causing unlawful loss to the foreign buyer.

2. The petitioner was charged by the Special Court (Commercial), Karachi under section 5 of the Imports and Exports (Control) Act, 1950 read with section 4(a) of the Export (Quality Control) Order, 1973 and, following conclusion of trial, was convicted under section 5(b) of the Imports and Exports (Control) Act, 1950 read with section 4(a) of the Export (Quality Control) Order, 1973 for 9 months' rigorous imprisonment ("RI") and was also directed to refund the amount of US \$ 87,671.21 "as per current and existing rate of US Dollar".

3. Sindh High Court while disposing of the appeal filed by the petitioner maintained the conviction, however, the sentence was reduced to one already undergone. Insofar as the recovery of compensation i.e. specified amount of US \$ 87,671.21 was concerned, the High Court observed, "the same shall be deposited by the appellant equivalent to the Pakistan currency at the date of awarding conviction and thereafter his release letter shall be issued to the concerned Superintendent of Jail."

4. The petitioner preferred present jail petition seeking special leave to appeal the decision of the High Court along with an application for condonation of delay of 762 days.

5. It is worth noting that a sentence of nine (09) months' RI was imposed on the petitioner but his release order could not be

issued by virtue of the condition placed on his release by the High Court. The petitioner is in the prison for more than eight (08) years only because he could not pay the compensation amount. Since the legality of the condition set down on the release of the convict raises certain constitutional questions, this Court has ample power to condone the delay in filing of appeal in such like cases. In the case of "Mian Muhammad Nawaz Sharif v the State" (PLD 2009 SC 814), this Court while condoning the delay of more than eight (08) years, observed:

18. Additionally, this Court is always slow in dismissing petitions against conviction and sentence on the question of limitation and is more inclined to examine the case on merits in order to prevent grave miscarriage of justice notwithstanding delay. There is no dearth of case law in support of this proposition, reference, however, may be made to some authorities cited by the learned counsel for the petitioner. In the case of *Abdur Rehman v The State* (1978 SCMR 292) this Court reviewed its own judgment in a review petition filed by the convict after a delay of 1119 days. In another case *Ziaul Rehman v The State* (2001 SCMR 1405), the petition for leave to appeal filed by the convict with a delay of 266 days was condoned on the ground that dismissal of the appeal on such a technical ground would have caused grave injustice to the accused under the circumstances of the case. The petitioner's petition was heard on merits and his conviction and sentence was set aside. In *Muhammad Sadiq v. Muhammad Sarwar* (PLD 1973 SC 469) where the Honourable Mr. Justice Dorab Patel, as he then was, after finding the convict not guilty condoned the delay for filing the petition, holding that the Supreme Court generally condones delay in criminal cases. The Lahore High Court in *Abdul Waheed v The State* gave convincing reasons for condonation of delay in criminal matters, as, unlike civil matters, no enforceable right accrues to the other party upon expiry of the time limitation.

19. Under Rule 4 of Order XXIII of the Supreme Court Rules, 1980, leave to appeal in criminal matters are to be filed within 30 days from the date of judgment or final order sought to be appealed from. However, the second proviso to the Rule empowers this Court to extend the time if the petitioner is able to show sufficient cause. Sufficiency of the cause depends upon the circumstances of each case. In the light of

what has been discussed above, the circumstances which prevented the petitioner from filing petition against his conviction and sentences were indeed extraordinary and we consider these to be sufficient cause for extension of time. The second objection raised is, therefore, not sustainable.

In the instant case, perhaps it was lack of paying capacity of the petitioner which prevented his release after the service of the sentence and for the same reason he could not appeal to this Court. We consider it an appropriate case for condonation of delay. Hence, the application (Cr.M.A.1277 of 2018) for condonation is allowed.

6. There is sufficient documentary evidence on record that the petitioner received an amount of USD 87,671.21 from Ms. Lina Bomba of M/s Jaed Textile Proprietary Limited, Sydney, Australia in a business transaction but failed to honour his commitment or return the money to the buyer. We do not find any discrepancy in the appreciation of evidence by the two courts below and uphold conviction of the petitioner Muhammad Iqbal.

7. However, we find problem with the sentencing approach adopted by the two courts below. Relevant provisions of the Imports and Exports (Control) Act, 1950 are reproduced hereunder for convenience and ready reference.

5. Penalty. [(1)] If any person contravenes [any provision of this Act or] any order made or deemed to have been made under this Act or the rules made thereunder, or makes use of an import or export licence otherwise than in accordance with any condition in that behalf imposed under this Act, he shall without prejudice to any confiscation or penalty to which he may be liable under the provisions of the [Customs Act, 1969 (IV of 1969)], as applied by sub-section (3) of section 3 of this Act be **punishable with imprisonment for a term which may extend to one year, or with fine, or with both.**

2[(2). ---

(3) ---

5B. Jurisdiction.

(1)----

(2)---

(3)---

(4)---

(5) Where a Commercial Court finds an exporter against whom a complaint has been made guilty of contravening any provision of an order made under section 3 relating to export trade, it may, in addition to any punishment provided under section 5, **make an order requiring the exporter to deposit in Court within the time specified by the Court for payment to the foreign buyer as compensation such amount as is in its opinion equivalent in value to the loss or damage suffered by the foreign buyer:**

Provided that, where immediate payment of compensation to such foreign buyer is, in the opinion of the Commercial Court, in the best interests of the country, **it may direct the payment of such Compensation from out of the Revolving Fund set up by the Federal Government.**

(6) The amount of compensation payable by an exporter in pursuance of an order under subsection

(5) shall be recoverable as an arrear of land revenue along with interest at the prevailing bank rate for the period following the expiration of the time within which such amount was payable.

(7) The amount of compensation along with interest recovered from the exporter shall be credited to the Revolving Fund.

8. Power to make rules. The Federal Government may make rules not inconsistent with this Act for carrying out the purposes of this Act and may in **such rules provide for the setting up of a Revolving Fund and for matters relating thereto.**

(emphasis supplied)

8. The plain reading of above quoted provisions states that the Commercial Court is empowered to direct the exporter/seller to refund or pay certain amount with or without damages to the foreign buyer and in case of his failure to pay that amount, it shall be recoverable as an arrear of land revenue along with interest at the prevailing bank rate for the period following the expiration of the time within which such amount was payable and

it shall be credited to the Revolving Fund. The Commercial Court, “may direct the payment of such Compensation from out of the Revolving Fund set up by the Federal Government.”

9. The Commercial Court as well as High Court have failed to correctly apply the law regarding refund to the buyer and treatment of the accused/convict in case of failure of payment of compensation amount. It might be relevant to observe that judicial system plays an important role in the national economic life. US Supreme Court, in some other context while keeping economic realities in view, rightly observed, “we cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.” **“The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 92 S. Ct. 1907 (1972)”**. Therefore, to improve our exports, we as a citizen and nation need to improve foreign buyers’ trust in our system as a reliable trade partner. The Commercial Court could have and in this case should have directed refund to the buyer from the Revolving Fund if the same was immediately not payable by the exporter. On the other hand, the law clearly tells that if the exporter fails to pay the amount to the buyer within the time specified by the Court, the said amount can be recovered as an arrear of land revenue. The law does not call for indefinite incarceration in case of default in payment. In the circumstances of the case, indefinite confinement in return for default in payment is violative of Articles 9,10 and 14 of the Constitution and we do not see any justification for that. Therefore, we set aside the condition of payment/refund of compensation amount for the release of the petitioner.

10. These are the reasons for our short order dated 15.12.2021 which reads as under:-

"For the reasons to be recorded later this jail petition is converted into appeal and allowed in the following terms:-

1. The application (Cr.M.A.1277 of 2018) for condonation is allowed.
2. We maintain the judgment of the learned High Court to the extent of conviction and sentence awarded to Muhammad Iqbal under Section 5(1) of Import and Export (Control) Act, 1950 (Act No. XXXIX of 1950 in Complaint Case No. 01/2012. However, we set aside the condition of payment/refund of compensation amount for his release. Convict Muhammad Iqbal has already served his sentence, therefore, he be released forthwith if not required in any other case.
3. The Federal Government, under section 5-B (5) of Import and Export (Control) Act, 1950 is directed to pay Mrs. Lina Bomba of JEAD Textile Limited, Sydney, Australia (buyer) compensation/refund an amount of US Dollar \$ 87671.21 along with interest at the prevailing bank rate from the date of judgement of trial court i.e. 25.06.2014 till the date of payment from the Revolving Fund established under Section 8 of Import and Export (Control) Act, 1950 or, from the Federal Consolidated Fund, if the former has not been established yet. Secretary to the Ministry of Finance, Government of Pakistan, is directed to submit compliance report to the Additional Registrar (Judicial) of this Court within a fortnight.
4. The Federal Government may recover the amount of compensation from convict Muhammad Iqbal in terms of Section 5-B (6) and (7) of Import and Export (Control) Act, 1950 as arrears of land revenue, in separate proceedings as per law.

Islamabad, the
15th of December, 2021
(Syed Farhan Ali)

"APPROVED FOR REPORTING"