Manzoor Ahmad Malik, J.- I have had the privilege to read the Order dated 22.02.2021 (**the Order**) of my learned brother Umar Ata Bandial, J with which other learned Members of the Bench, except me, have concurred. I do agree with the conclusion drawn in Para 31(ii)(a) of the order regarding numeric strength of a Bench to review a judgment under Order XXVI, Rule 8 of the Supreme Court Rules, 1980 (**SCR**). However, with respect, I have not been able to subscribe to several findings/observations given in the order for reasons discussed hereunder.

2. Through the instant miscellaneous applications filed under Order XXVI, Rule 8 of the SCR, the applicants have prayed for reconstitution of Bench for hearing several review petitions filed against the judgment passed by this Court in ***Justice Qazi Faez Isa v. President of Pakistan & others*** *(Const. P. No. 17 of 2019)* and connected petitions.

3. Const. Petition No. 17 of 2019 and other connected petitions filed under Article 184(3) of the Constitution of the Islamic Republic of Pakistan (**Constitution**) were disposed of through a short order dated 19.06.2020[1] by a ten Member Bench (**Larger Bench**) of this Court, of which I was also a member. The review petitioners are aggrieved mainly of Paras 3 to 11 of the short order to which seven Members of the Larger Bench including me, had concurred. Later

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[1] Justice |Qazi Faez Isa and 14 others v. the President of Pakistan & others (PLD 2020 SC 346)

on, detailed reasons for the short order dated 19.06.2020 recorded by my learned brother Umar Ata Bandial, J were released on 23.10.2020[2] to which Justice Faisal Arab added his concurring separate note. Three learned Members of the Larger Bench passed separate minority judgments. Thereafter, a seven-Member Bench (**Review Bench**) was constituted by the Hon'ble Chief Justice of Pakistan to hear the review petitions. These petitions came up for hearing before the Review Bench on 28.10.2020. However, the matter was adjourned on the request of review petitioners. In the meanwhile, Justice Faisal Arab superannuated on 04.11.2020 and thereafter, the miscellaneous applications filed for reconstitution of Bench were fixed before a Bench comprising the six remaining Judges by the order dated 11.11.2020 passed by the Hon'ble Chief Justice **(HCJ)**. It has been prayed in all such miscellaneous applications that the review petitions be heard by the same number of Judges who have passed the judgment under review except the miscellaneous applications filed by Mr. Muneer A. Malik, Sr. ASC (representing the review petitioner in C.R.P. No. 296 of 2020) and Mrs. Sarina Isa (review petitioner in C.R.P. No. 298 of 2020), wherein they have prayed that all the Hon'ble Judges including the Judges, who have passed the minority judgments, be made part of the Review Bench.

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[2] PD 2021 SC 1

4. After hearing the applicant-petitioner Mrs. Sarina Isa, present in person (in CRP 298 of 2020 and CMA 7085 of 2020) and learned counsel for review petitioners at length and perusing the available record with their assistance, it is observed that so far as the question relating to the numeric strength and composition of the Review Bench is concerned, the same has two segments. Firstly, the question of numeric strength of the Review Bench and secondly what should be its composition i.e. whether the Bench should consist of only those Judges who passed the majority judgment or whether those Judges, who have passed the minority judgments (in this case three learned Judges of this Court), are also to be included in the Review Bench.

5. A judgment (direction, order or decree) passed by this Court, unanimously or by majority becomes the ***Order of the Bench*** and ***Order of the Court.*** In simple words, the majority judgment (Order of the Court) is the judgment of the entire Bench that had heard the original matter.

Mr. Munir A. Malik, Sr. ASC appearing on behalf of applicant (in CMA 7084 of 2020) contended that Order XXVI Rule 8 of SCR stipulates that as far as practicable the application for review shall be posted before the same Bench that delivered the judgment or order sought to be reviewed. He further contended that 'same Bench' included all the Judges of the Bench, whether in majority or minority as the Order of the Bench or Order of the Court is an order or judgment of all the Judges who were part of the Bench that had

delivered the judgment sought to be reviewed. To substantiate his contentions, learned counsel referred to Paras 26 & 27 of the judgment passed by a seven-Member Bench of this Court in **Z.A. Bhutto's** case[3] wherein it was held that in terms of Rule 6 Order XXVI, Supreme Court Rules, 1956, the review petition had to be heard by the seven Judges of this Court, who had delivered the judgment under review, and who were all available on the Bench for the disposal of the review petition and their presence on the Bench was necessary, as they were continuing as Judges of the Supreme Court and were available for the disposal of review petition.

6. It is relevant to mention that the criminal appeal[4] of Mr. Zulfiqar Ali Bhutto against his conviction and sentence was heard by a seven-Member Full Court Bench of this Court and was decided by a majority of four to three. When the review petitions were posted for hearing, a question arose regarding the inclusion of three Judges who had dissented with the majority view. In Para 27 of the final judgment whereby review was dismissed, Muhammad Akram, J observed as under:-

> *"27. At a subsequent stage a question arose as to the position of the three learned Judges of this Court who had recorded dissenting opinions in regard to the disposal of the petitioner's appeal. Again, relying upon the aforesaid rule 6, we took the view that as they were part of the Bench that delivered the judgment sought to be reviewed, their presence on the Bench was necessary, as they were continuing as Judges of the*

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[3] PLD 1979 SC 741

[4] PLD 1979 SC 53

Supreme Court and were available for the disposal of the review petition."

7. In this backdrop, it has rightly been observed in Para 18 of the Order that, it is not desirable to resolve this controversy because the decision in **Z. A. Bhutto's** case was given by a seven Member Bench whereas to resolve the instant controversy, a six Member Bench is sitting and unless a Larger Bench (comprised of more than seven Judges) re-examines the matter and arrives at a different conclusion, the decision in **Z. A. Bhutto's** case is binding on the Court.

In the circumstances, I agree with the contentions of learned counsel for the applicant that the review petitions shall be heard by the same Bench that had delivered the judgment or order under review and the 'same Bench' includes all the Judges of the Bench, whether in majority or minority (subject to their availability) as the order or judgment of the Court is an order or judgment of all the Judges who were part of the Bench and who had delivered the judgment sought to be reviewed.

8. In Para 28 of the Order while referring to Para 3 of the note added by Justice Dorab Patel in the review of **Z.A. Bhutto's** case it has been observed that *"the Judges who have dissented with the majority view while sitting on the Bench hearing the review ought to show maximum restraint and maintain judicial dignity and quietude, particularly when they had already expressed an opposite view in*

the original matter." For convenience, Para 28 of the Order is reproduced herein below:-

> *28. We must now refer again to the Z A Bhutto case to read another valuable judicial observation, namely, the brief judgment of Justice Dorab Patel. His Lordship is regarded as one of the titans of the law and anything that fell from his pen is worthy of, and warrants, close attention. As noted, he had been in the minority in dismissing Mr. Bhutto's appeal against conviction. In the concluding paragraph of his judgment (in review) Justice Dorab Patel reflected on how a Judge who dissented ought to act if called upon to sit in review of the majority judgment. His words distil the wisdom of the ages:*
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> > *"However, Mr. Yahya Bakhtiar's arguments on the question of sentence were without prejudice to his main submission, which was that the majority judgment suffered from errors apparent on the record which had resulted in the dismissal of Mr. Bhutto's appeal. Now learned counsel had addressed us for nearly two weeks on this question, but as he has failed to persuade the Judges, who pronounced the majority judgment of the Court, to revise the finding of guilt of the petitioner, it follows that the review petition must be dismissed. In these circumstances, consistently with judicial dignity and the practice of this Court, I do not think it would be proper for me to make any observations on learned counsel's submissions; and I would dismiss the petition for the reasons given herein."*
> >
> > *(emphasis supplied)*
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> *As is clear from the foregoing, Justice Dorab Patel believed that the question whether a case had been made out for the review of a judgment was, in the final analysis, essentially something for the Judges who actually delivered the judgment under review to decide. If those Judges were not so persuaded, then any other Judges sitting on the Bench hearing the review ought to show maximum restraint and maintain judicial dignity and quietude, particularly when they had already expressed an opposite view in the original matter. It is quite obvious that the learned Judge was acutely aware of, and alive and sensitive to, the very real possibility of*

> *the Judges, howsoever unwittingly and despite their best efforts, slipping from the exercise of review jurisdiction into regarding consideration of the review petition as but the "second round" in an ongoing litigation. The words and wisdom of Justice Dorab Patel are evergreen and, in our respectful view, merit reflection by all Judges in every generation."*

9. There are no two opinions that Dorab Patel, J. is one of the stalwarts of judicial fraternity of this country. Every word, order and judgment penned down by his lordship is of immense legal significance. It, however, appears that while drawing the conclusion in Para 28 of the Order, perhaps Para 2 of his lordship's (Justice Dorab Patel) note in **Z A Bhutto's** case escaped the attention of my learned brothers. In this Para, my lord (Justice Dorab Patel) had fully discussed the arguments canvassed by learned counsel for review petitioner, Mr. Zulfiqar Ali Bhutto. For ready reference and to fully grasp the spirit of Para 3 of the note of Dorab Patel, J. which has been referred in the Order, it is imperative to reproduce Para 2 of his lordship's note, which reads as under:-

> *"As submitted by Mr. Yayha Bakhtiar, there are judgments in which capital punishment has been imposed only on the persons who have actually participated in the killing of the victim of the offence, and the lesser sentence has been imposed on the person or persons who have instigated or abetted the murder. Similarly there are judgments in which the lesser sentence has been imposed for murder on account of a cleavage of opinion in the Court which heard the appeal. <u>But confining myself only to the reported judgments of this Court in the last three years to which I was a party, this principle was not followed in Aminullah v. the State, in Roshan and 4 others v. the State and in Noor Alam v. the State. Perhaps because the trend of authority in this Court in the last eight or ten years has been consistently against the proposition advanced by learned counsel, he placed great stress on the unusual cleavage of opinion in the instant case. Be that as it may, learned counsel's main stress was on the fact that</u>*

> *even according to the prosecution it was not Mr. Bhutto who had fired the fatal shots at Mr. Kasuri's car and that in any event the victim of the offence was not the person whose murder Mr. Bhutto had planned. But these are circumstances which, according to the settled law, were relevant to a plea for mitigation of sentence, therefore, learned counsel should have referred to them in his arguments before us in the appeal against Mr. Bhutto's conviction, the moreso, as the question of sentence is a question in the discretion of the Court. I am also not aware of any case either of this Court or of the High Courts in which counsel for the appellant has, whilst challenging a conviction for murder, not addressed arguments in the alternative on the question of sentence. I, therefore, agree with the view of Akram, J., that the question of sentence cannot be raised in a review petition, and if we were to alter the sentence in this review, we would be unsettling the settled law. But, although we are thus precluded by law from going into the question of sentence, as observed by Akram, J., in the concluding paragraph of his order, the grounds relied upon by Mr. Yahya Bakhtiar for mitigation of sentence are relevant for consideration by the executive authorities in the exercise of their prerogative of clemency."*
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> *(Emphasis supplied)*

10. It is thus clear from the aforesaid Para 2 that Dorab Patel, J was conscious of his jurisdiction and exercising his judicial power while hearing the review petition gave his own observations on merits and then subscribed to the conclusion drawn by Akram, J. who wrote the review judgment. In this context, the opinion of Justice Abdul Kadir Shaikh expressed in the case of ***Federation of Pakistan v. Muhammad Akram Shaikh***[5] is also relevant. This case primarily dealt with the question of bias in relation to some Judges hearing the review petitions. While relying on the judgment[6] of this

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[5] PLD 1989 SC 689

[6] PLD 1976 SC 315

Court with regards to the question of issuance of a writ against the Judges of Superior Courts, Justice Abdul Kadir Shaikh observed:

> *"The above views expressed by Cornelius, C.J. and Muhammad Yaqub Ali, C.J. are weighty principles of law, and I am clearly of the opinion that one set of Judges of this Bench, which has been constituted by my Lord the Chief Justice, cannot issue a direction to the other set of Judges or any of the Judges of this Bench, not to associate themselves or himself in the hearing of the Review Petition. I cannot conceive of a situation where one Judge of a Division Bench constituted by my Lord the Chief Justice to hear a case can direct the other Judge of the Bench not to hear the case on the ground that he has a bias or an interest in the case, or for that matter on any other ground whatsoever. If this bar were not to exist, then it would amount to permitting the Judges to destroy or take away the judicial function or power of each other, which position is neither conceived nor permitted by the Constitution."*
>
> (Emphasis supplied)

I have not been able to set my hand on any provision of the Constitution and the SCR that limits the jurisdiction and judicial power of a minority judge while sitting in review of the Order of the Bench or Order of the Court as against those Judges who had delivered the majority judgment. In my humble view, the observation given in Para 28 of the Order that *"the Judges who dissent with the majority judgment ought to show maximum restraint and quietude"* while sitting on the Bench hearing the review, may give an impression of undermining the judicial independence of other Judges. Indeed, the grounds for review are limited and apply equally to both the Judges who rendered the majority view and the Judges who rendered the minority view. In this backdrop, with utmost respect, I do not and cannot persuade myself to subscribe to the

observations and findings of my learned brothers given in Para 28 of the Order.

11. Lastly, I would also like to observe that the term 'master of roster' used in Para 22 of the Order cannot be understood to mean that the HCJ has unfettered discretion regarding constitution of Benches. In fact, the discretion vested in the office of the HCJ for constitution of Benches is to be exercised in a structured manner according to the SCR.

(**Manzoor Ahmad Malik**)
Judge

Islamabad
28th of April, 2021
K.Anees
APPROVED FOR REPORTING