

IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT:

MR. JUSTICE IJAZ UL AHSAN
MR. JUSTICE MUNIB AKHTAR
MR. JUSTICE SAYYED MAZAHAR ALI AKBAR NAQVI

(A/R)

CPLA No.287-P of 2016

And

CPLA Nos.290-P to 295-P, 310-P, 110-P & 111-P of 2019

Against judgment dated 04.04.2016, 20-06-2018 11.10.2018, passed in Writ
Petition No.185-B of 2015 and Writ Petitions No.317-A, 142-A, 424-A, 414-A,
72-A, 186-A, 187-A, 258-A & 468-A of 2018, etc.

Government of KP through Secretary, ***Petitioner(s)***
Home Department & others

VERSUS

Wali Khan, Zahid, Ghanimullah, ***Respondent(s)***
Aurangzeb Imran, Gohar Zaman, Saif ur
Rehman, Mir Shaid, Akhtar Ali & Kamran
Shah, etc

For the Petitioner(s): Malik Akhtar Hussain, Addl.AG, KP

For the Respondent(s): Mr. M. Amjad Iqbal Qureshi, ASC

Date of Hearing: 15.12.2021

JUDGMENT

IJAZ UL AHSAN, J- Through this single
judgment, we intend to decide Civil Petition Nos. 287-P of
2016, 110-P, 111-P, 291-P – 295-P and 310-P of 2019 as they
involve a common question of the law.

2. Through their petitions, the Petitioners have assailed
the judgments of the Peshawar High Court, Peshawar dated 04-04-
2016, 20-06-2018 and 11-10-2018 passed in W.P.Nos.185-B/15
and 317-A, 142-A, 424-A, 414-A, 72-A, 186-A, 187-A, 258-A &
468-A/18, etc whereby the Constitutional Petitions filed by the
Respondents were allowed. Resultantly, they were allowed the

remissions as prayed for and their sentences were either suspended or the punishments which they were awarded were remitted.

3. The brief facts giving rise to this *lis* are that the Respondents were convicted under Section 302 of the Pakistan Penal Code ("**PPC**") and sentenced to death by the trial Court for the commission of murder. They filed their respective appeals, and their sentences were modified to life imprisonment. Pursuant to various notifications issued by the Government, special remissions were granted to a class of prisoners by the President of the Islamic Republic of Pakistan (hereinafter referred to as "**President**") under Article 45 of the Constitution of the Islamic Republic of Pakistan (hereinafter referred to as "**Constitution**") on various occasions such as Eid and Independence Day of Pakistan etc. In light thereof, the Respondents applied to the Superintendents of their respective jails for the grant of ordinary and special remissions. They further requested that they be granted remissions under Article 45 of the Constitution. The Respondents were granted special and ordinary remissions. However, they were not granted the remissions provided in the notifications by the President under Article 45 of the Constitution. Aggrieved, they filed their respective writ petitions. The learned High Court allowed the same. The Petitioners have filed these Petitions for leave to appeal against the impugned judgments of High Court.

4. The learned Additional Advocate General, Khyber Pakhtunkhwa ("**AG KP**") contends that the notifications granting remissions to a certain class of prisoners excludes prisoners convicted of murder, espionage, anti-state activities, sectarianism, zina, robbery, dacoity, kidnapping/abduction and terrorist acts. Therefore, the Respondents are not entitled to the remissions under the Notification since they have committed the crime of murder under Section 302 of the PPC. The learned AG KP has further submitted that the remissions to which the Respondents were entitled have already been given to them. As such, they cannot claim the said remissions twice. In this respect, the learned AG KP has relied upon the remission reports of the Respondents which are placed on the record.

5. The learned ASC for the Respondents has supported the impugned judgments and has stated that the Respondents were entitled to be granted remissions by the President under Article 45 of the Constitution and, denial of the same gave them *locus standi* to approach the High Court for enforcement of their fundamental rights.

6. We have heard the learned AG KP and the learned ASC for the Respondents. The main questions which require determination by this Court are as follows: -

- (i) Whether the class of prisoners which the Respondents belong to could be granted remissions by the President of Pakistan under the Constitution through various notifications?
- (ii) Could the Respondents be denied remissions in light of the judgment in the case of **Nazar Hussain and Another v. The State (PLD 2010 Supreme Court 1021)**?

- (iii) Were the prisoner convicts in Criminal Petitions 291 and 293-P covered by the impugned judgment dated 04-04-2016?

WHETHER THE CLASS OF PRISONERS WHICH THE RESPONDENTS BELONG TO COULD BE GRANTED REMISSIONS BY THE PRESIDENT OF PAKISTAN UNDER THE CONSTITUTION THROUGH VARIOUS OCCASIONS?

7. The President issued various notifications through which remissions were granted to prisoners on occasions such as Eid and the Independence Day of Pakistan. One such example of these notifications is the notification dated 13-08-2011 whereby remissions were granted to a certain class of prisoners by the President on the advice of the Prime Minister of Pakistan on the occasion of 14th August 2011. These notifications nonetheless provided that the said remissions were unavailable to prisoners convicted of offences such as murder. For ease of reference, the said portion of the notification dated 13-08-11 is reproduced hereunder as: -

“Special remissions of 1/5th of total sentence awarded by the Courts to all convict prisoners and have undergone at least 2/3rd of substantive sentence of imprisonment except those convicted of murder, espionage, anti-state activities, sectarianism, Zina (Sec.10 Offence of Zina (Enforcement of Hudood) Ordinance 1979 (also under Sec. 377 PPC), robbery (Sec. 394 PPC), dacoity (Sec. 395 - 396 PPC), Kidnapping/abduction (Sec. 364-A & 365-A) and terrorist acts (as defined in the Anti-Terrorism (Second Amendment) Ordinance 1999 (No. XIII of 1996)” (Underlining is ours)

8. The latest notification placed on the record in this respect is the notification dated 31-05-2019 with the subject **“Special Remissions in sentences on the occasion of Eid-ul-Fitar, 2019”**. The said notification has been issued by the Ministry of Interior, Government of Pakistan and it is clear in insofar as convicts of murder and other serious crimes such as robbery and kidnapping are concerned that the said remissions shall not be granted to them. All the notifications

granting remissions, relied upon by the Respondents clearly and unequivocally state that convicts involved in serious crimes including murder, will not be entitled to special remissions. It is therefore clear that the Respondents could not have been granted remissions since they fall in the exceptions provided in the notifications *ibid*. No doubt, the power of clemency is a safeguard against possible injustice, nonetheless, the principles of criminal justice divide each crime into different categories. It is for this reason that murder is put at a higher level and attracts a greater punishment than assault because of the repercussions it has for the victim's family and for the society at large. This is perfectly in line with the objectives of the criminal justice system as well. The criminal justice system aims, *inter alia*, to rehabilitate offenders, retribute, punish, deter, and maintain peace and order in the society. One of the main purposes of a punitive and retributive system is to socially oust criminals in an exemplary manner, in the larger interest and protect law abiding citizens from criminal acts. The Respondents, after having committed crimes of heinous nature, were denied remissions by the President while exercising his authority under Article 45 of the Constitution. This was in line with the notifications so issued and the learned High Court erred in law as well as in fact to hold that the Respondents were entitled to remissions.

9. The case law relied upon by the learned High Court is distinguishable. The relevant paragraph of the

judgment reported as **Haji Abdul Ali v. Haji Bismillah (PLD 2005 Supreme Court 163)** is reproduced as under: -

"However, the remission of one year granted by the President of Pakistan on 6-1-2000, under Article 45 of the Constitution could not be refused to him on that ground. The order dated 6-1-2000 of the President of Pakistan passed in exercise of constitutional power did not lay down any such limitation or condition that a convict who was sentenced to life imprisonment under section 302(b), P.P.C falling in Chapter XVI of the P.P.C would be disentitled to the remission by virtue of section 402-C of Criminal Procedure Code." (Underlining is ours)

The case law *ibid* talks specifically about the notification dated 06-01-2000 in which exceptions such as those made in the notifications in question in the present *lis* have not been mentioned. Therefore, the case cited by the learned High Court was specific in nature and was restricted to the facts and circumstances on which the adjudication was being made at that time. The learned High Court without appreciating the distinguishing features and circumstances of the present *lis* has applied the principles of **Haji Abdul Ali's** case to the present *lis* without adverting to the fact that the notifications under which the Respondents are asking for remissions specifically exclude prisoner convicts who are convicted of murder and, abduction, and terrorist acts etc under the PPC. Therefore, the learned High Court misdirected itself and erred in law and in fact in reaching an erroneous conclusion which is not legally sustainable.

COULD THE RESPONDENTS BE DENIED REMISSIONS IN LIGHT OF THE JUDGMENT IN THE CASE OF NAZAR HUSSAIN AND ANOTHER V. THE STATE (PLD 2010 SUPREME COURT 1021)?

10. The powers of the President under Article 45 of the Constitution are no doubt unabridged by any subordinate

legislation as provided in **Nazar Hussain and another v. The State (PLD 2010 Supreme Court 1021)**. In the case at hand, Rule 207 of the Pakistan Prison Rules empower the Superintendents of the respective jail to grant remissions. Nevertheless, where there is a conflict between the Pakistan Prison Rules and any provision of the Constitution, it is settled rule of law that the provisions of the Constitution shall prevail. There is, however, a fundamental difference in exercise of powers by the Superintendent of the jail and the President of Pakistan. The Superintendent does not grant executive clemency. He exercises authority under the relevant law by allowing only those remissions granted to prisoners which are provided in the law. The Superintendent cannot therefore issue a notification on his own volition and allow prisoners remissions on various occasions. His actions must be backed by the law. The President on the other hand, may issue such notifications and allow remissions in exercise of his Constitutional powers. For ease of reference, Article 45 is reproduced below: -

"The President shall have power to grant pardon, reprieve and respite, and to remit, suspend or commute any sentence passed by any court, tribunal or other authority".

The President therefore has a wide range of powers provided under the Constitution. On the other hand, the Superintendent exercises limited powers available to him under the law. He cannot under any circumstances exercise the powers available to the President. The Superintendent can merely grant remissions specified in the Jail Manual to prisoners who qualify for the same. The President may,

however, grant remissions on any occasion, which is a wide-ranging power only available to the President under the Constitution. Executive clemency is exercised to reinforce the rehabilitative objective of the criminal justice system. Nonetheless, it does not exist to provide blanket protection to criminals who have committed serious crimes against society.

11. The learned ASC for the Respondents has submitted that the Respondents could not have been denied remissions under Article 45 when they were granted the benefit of Section 382-B of the Code of Criminal Procedure (hereinafter referred to as "**Cr.P.C**") because this amounted to depriving the Respondents of their liberty. In this respect, they have relied upon the case of Nazar Hussain (*supra*). We are unable to agree with the contention of the learned ASC for the Respondents. Article 25 of the Constitution provides that all citizens are equal and are entitled to equal protection of the law. The state is, however, empowered to create classifications based on intelligible differentia. This means classifications on a rational or reasonable basis, having a nexus with the object sought to be achieved. The President is fully empowered to make such a classification and exclude those who have committed serious crimes such as murder, abduction, terrorism etc. It may be noted that the concept of classifications is not alien to our criminal jurisprudence. A class of prisoner convicts has also been denied even remissions in the Pakistan Prison Rules, 1978. Rule 201-A of which provides that:

"Notwithstanding anything contained in these rules, a person convicted under the charge of espionage/anti-state activities shall not be entitled to ordinary and special remission unless Federal Government or the Provincial Government or competent authority makes a specific order in writing in this behalf".

12. The denial of remissions even in the Prison Rules to those convicted of espionage/anti-state activities furthers the argument that if a class is created based on intelligible differentia, backed by reasonable or rational basis, it does not violate the Constitutional mandate of Article 25. Even the discrimination argument is available only in cases of unequal treatment amongst equals. To suggest that a person convicted of murder, terrorism, kidnapping or abduction deserves equal treatment with a person convicted of petty theft or some other "minor" offence is, to say the least, *ex facie*, absurd, preposterous and illogical. Hence, the argument of the learned ASC for the Respondents in this behalf is found to be misconceived and is accordingly repelled.

WERE THE PRISONER CONVICTS IN CRIMINAL PETITIONS 291 AND 293-P COVERED BY THE IMPUGNED JUDGMENT DATED 04-04-2016?

13. The learned High Court has held in some of the impugned judgments that the cases of the Respondents in Criminal Petitions 291 and 293-P are covered by the impugned judgment dated 04-04-2016. We are unable to agree with this conclusion. Firstly, the learned High Court for reasons best known to it has given no justification as to how a precedent of a conviction of murder under Section 302 of the PPC can or may be applied to case of abduction under Section 365-A of the PPC. The learned High Court has simply held that the cases of the said Respondents are covered by

the impugned judgment dated 04-04-2016. It is settled law that each case must be adjudged on its own facts and circumstances. The cases of the said Respondents were entirely different than the case under determination before the High Court in which the impugned judgment dated 04-04-2016 was passed. Therefore, we hold that the learned High Court incorrectly applied the law and the judgment dated 04-04-2016 and 20-06-2018 to the cases of the Respondents in Criminal Petitions 291 and 293-P of 2019.

14. Even otherwise, the notifications issued by the Government clearly exclude the said Respondents from getting remissions since they have been convicted for abduction, which has been specifically named in the notifications to be excluded from the benefit of remissions. As such, the learned High Court has erred in law and in fact in applying the impugned judgments *ibid* to the case of the said Respondents which are even otherwise entirely different and distinguishable.

15. The impugned judgment of the learned High Court proceeds on erroneous grounds has jurisdictional errors and suffers from legal defects discussed above which warrant interference of this Court. The learned Counsel for the Respondents has been unable to persuade us to endorse the view taken by the learned High Court.

16. As a result of the above discussion, these Civil Petitions are converted into appeals and allowed. The

impugned judgments of the Peshawar High Court dated 04-04-2016, 20-06-2018 and 11-10-2018 are accordingly set-aside.

17. We had vide order dated 28-05-2021 directed that the AG KP may submit a summary of relevant facts of each case. It has been brought to our notice that the convicts in Civil Petitions 111-P, 290-P, 292-P and 295-P have been released having served their respective sentences. As such, the said Civil Petitions are dismissed as having become infructuous.

ISLAMABAD, THE

15th of December, 2021

Haris Ishtiaq/ *

'Not Approved For Reporting'