IN THE SUPREME COURT OF PAKISTAN
(Review Jurisdiction)

PRESENT:

Mr. Justice Umar Ata Bandial
Mr. Justice Maqbool Baqar
Mr. Justice Manzoor Ahmed Malik
Mr. Justice Mazhar Alam Khan Miankhel
Mr. Justice Sajjad Ali Shah
Mr. Justice Syed Mansoor Ali Shah
Mr. Justice Munib Akhtar
Mr. Justice Yahya Afridi
Mr. Justice Qazi Muhammad Amin Ahmed
Mr. Justice Amin-ud-Din Khan

CIVIL REVIEW PETITION NO.296 OF 2020 a/w
Civil Misc. Application No.1243 of 2021 &

CIVIL REVIEW PETITION NO.297 OF 2020 &

CIVIL REVIEW PETITION NO.298 OF 2020 &

CIVIL REVIEW PETITION NO.299 OF 2020 &

CIVIL REVIEW PETITION NO.300 OF 2020 &

CIVIL REVIEW PETITION NO.301 OF 2020 &

C.M.A. NO.4533 OF 2020 IN CRP NO.NIL OF 2020 &

CIVIL REVIEW PETITION NO.308 OF 2020 &

CIVIL REVIEW PETITION NO.309 OF 2020 &

CIVIL REVIEW PETITION NO.509 OF 2020

Justice Qazi Faez Isa	**... Petitioner(s)** (in CRP No.296/2020)
Sindh High Court Bar Association	**... Petitioner(s)** (in CRP No.297/2020)
Mrs. Sarina Isa	**... Petitioner(s)** (in CRP No.298/2020)
Supreme Court Bar Association	**... Petitioner(s)** (in CRP No.299/2020)
Muhammad Asif Reki President Quetta Bar Association	**... Petitioner(s)** (in CRP No.300/2020)
Shahnawaz Ismail, VC Punjab Bar Council	**... Petitioner(s)** (in CRP No.301/2020)
Balochistan Bar Council	**... Petitioner(s)** (in CRP No.308/2020)
Pakistan Federal Union of Journalists	**... Petitioner(s)** (in CRP No.309/2020)

Abid Hassan Minto	**... Applicant(s)** (in CMA No.4533/2020 in CRP No.Nil of 2020)
Pakistan Bar Council thr. VC	**... Applicant(s)** (in CRP No.509 of 2020)
Versus	
The President of Pakistan and others	**... Respondent(s)** (in CRP 296-3012 & 308-309 & CRP 509 of 2020)
The Supreme Judicial Council thr. its Secretary and others	**... Respondent(s)** (in CMA No.4533 of 2020)

For the Petitioner(s)	:	Mr. Justice Qazi Faez Isa (In-person) (in CRP. 296/2020)
		Mr. Rasheed A. Rizvi, Sr. ASC. (through Vide Link from Karachi). (in CRP.297 & 309/2020)
		Mrs. Sarina Faez Isa (In-person) (in CRP.298/2020)
		Mr. Hamid Khan, Sr. ASC. Syed Rifaqat Hussain Shah, AOR (in CRP.299, 300, 301 & 308/2020)
		Nemo (in CMA.4533/2020)
		Nemo (in CRP.509/2020)
For Federation of Pak.	:	Ch. Aamir Rehman, Addl. AGP.
For President, PM & AGP.	:	Mr. Sohail Mahmood, Addl. AGP.
Date of Hearing:		02.03.2021; 03.03.2021, 08.03.2021; 17.03.2021 & 18.03.2021

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JUDGMENT:

Munib Akhtar, J.: The learned petitioner in CRP 296/2020 filed CMA 1243/2021 ("CMA") seeking the following relief:

> "Therefore, for the reasons stated above [in the CMA] this Hon'ble Court may be pleased to: (a) direct the State-owned Pakistan Television Corporation (PTV) to broadcast live the proceedings of the petitioner's case, (b) to direct the Pakistan Electronic Media Regulatory Authority (PEMRA) to issue written instructions to all private channels that they cannot be restrained in any manner whatsoever from broadcasting the proceedings and (c) to order live streaming of court proceedings.

The prayer has been made in the best interest of justice."

2. The CMA was heard over several dates and was ultimately dismissed by a majority of 6:4 on 13.04.2020, when the following short orders were made (reported as *Justice Qazi Faez Isa and others v President of Pakistan and others* PLD 2021 SC 595):

[*per* Umar Ata Bandial, Sajjad Ali Shah, Munib Akhtar, Qazi Muhammad Amin Ahmed and Amin-ud-Din Khan, JJ.:]

"For reasons to be recorded later, this Misc. Application is dismissed. However, the right of the people to have access to information in matters of public importance under Article 19-A of the Constitution is recognized, the details and modalities of which are to be decided by the Full Court on the administrative side."

[*per* Maqbool Baqar, Manzoor Ahmed Malik, Mazhar Alam Khan Miankhel and Syed Mansoor Ali Shah, JJ.:]

"For the reasons to be recorded later, we dispose of the miscellaneous application (CMA No.1243/2021) filed by the Petitioner in review petition (CRP No.296/2020) in the following terms:

i) Article 19-A of the Constitution of the Islamic Republic of Pakistan, 1973 ("Constitution") creates an obligation on State institution, including the Judiciary, to take the necessary measures to ensure realization of the fundamental right of citizens to have access to information in matters of public importance. Cases under Article 184(3) of the Constitution, including review petitions and other matters arising therein, are matters of public importance, and the public has a right to know and see how proceedings in these cases are conducted and concluded by the Court. We, therefore, hold that *Live Streaming* (audio and video) of Court hearings of these cases should be made available for information of the public through a link on the official website of this Court, and for this purpose the Registrar of this Court should take steps to provide for the requisite technological infrastructure and make arrangements for necessary amendments in the Rules under Article 191 of the Constitution to regulate its practice and procedure in this regard;

ii) Keeping in view the current state of technological infrastructure available in this Court and the fact that the review petitions filed in the case are fixed for hearing, we direct the audio recording of the proceedings of the court hearings of the said review petitions to be made available to the public through a link on the official website of this Court. The Registrar of this Court shall ensure that the un-edited

audio recording of the proceedings of the court hearing of the review petitions is made available to the public on the official website of the Court on the same day soon after the hearing and before the close of the working hours."

[*per* Yahya Afridi, J.:]

"For the reasons already recorded in my judgment delivered in Constitution Petition No.17 of 2019, the present Civil Miscellaneous Application No.1243 of 2021 is dismissed, as the relief sought by the petitioner would "negate the very spirit of the oath taken by the petitioning Judge".

2. However, for the reasons to be recorded later, I find the right of the public to have access to live-streaming or audio-video recording, written transcript or any other medium, of the court hearings in the proceedings of public importance, including those under Articles 184(3) and 186 of the Constitution, is their fundamental right under Article 19A of the Constitution. The Registrar of this Court is, therefore, directed to place the matter before the Full Court for appropriate steps as it deems fit, under Article 191 of the Constitution, to effectuate this fundamental right of the public."

The Order of the Court was as follows:

"By majority of 6 to 4 (Maqbool Baqar, J; Manzoor Ahmad Malik, J; Mazhar Alam Khan Miankhel, J and Syed Mansoor Ali Shah, J dissenting), Civil Misc. Application No.1243 of 2021 is dismissed."

3. The following are our reasons for dismissing the CMA.

4. The learned petitioner, who appeared on his own behalf, anchored and seated his case in support of the CMA in the well known legal precept that justice must not only be done, it should be seen to be done. As is well known, this fundamental rule, essential for the dispensation of justice, was stated in the form in which it is best known by Lord Hewart, CJ, who famously said in *R v Sussex Justices ex parte McCarthy* [1924] 1 KB 256, [1923] EWHC KB 1 as follows: "... a long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done".

5. The learned petitioner began his submissions by drawing attention to Article IV of the Code of Conduct formulated for Judges of the Supreme Court and the High Courts by the Supreme Judicial

Council under Article 209(8) of the Constitution, where express reference is made to the aforementioned rule in the second paragraph. It was submitted that since the rule lay at the heart of the code of conduct to which Judges had to adhere, it was vitally important that it be applied with vigor. The CMA was filed to ensure that justice should be seen to be done in the instant case, i.e., the review petitions being heard by the Court. It was submitted that it was important that the public at large should actually see justice being done, which could only be ensured by giving them access to the proceedings and hearings in terms as prayed for in the CMA. In support of his case, the learned petitioner gave a homely example, referring to his young granddaughter who, when asked whether she saw justice, replied that she only saw it when she came to the Court, or on TV. And, even though the courtroom was almost invariably packed on the days that the review petitions were fixed for hearing, the learned petitioner submitted that that represented only a tiny sliver of the public. Even though the hearings were in open court to which members of the public (including the press) had access that was not the same as the public at large having the opportunity to hear and see the proceedings for themselves. It was for that reason that relief was prayed for as in the CMA. In support of his prayer, the learned petitioner, inter alia, referred to local and foreign case-law. In particular, he relied on two cases: *National Director of Public Prosecutions v. Media 24 Limited & others* [2017] ZASCA 97 decided by the Supreme Court of Appeal of South Africa ("*NDPP*") and *Swapnil Tripathi v. Supreme Court of India* AIR 2018 SC 4806 ("*Swapnil*") decided by the Supreme Court of India.

6. We intend no disrespect for not immediately engaging with the submissions made by the learned petitioner in support of his application. The reason is that the learned Additional Attorney General ("AAG") in reply raised a preliminary objection that needs to be considered first. It is only if the legal hurdle thrown up by this objection is crossed that there will be a need to consider in detail the submissions made by the learned petitioner.

7. The learned AAG opposed the application on two main grounds:

a. The application was not maintainable as it had been filed in review jurisdiction under Article 188 of the Constitution, which by its nature was limited; and
b. There was no constitutional or statutory right available which provided for public broadcast and/or live streaming of proceedings of the Court.

8. The preliminary issue as to maintainability was in the context of the main petitions being an invocation of the review jurisdiction of the Court. The learned AAG submitted that to invoke the fundamental right of access to information under Articles 19 and/or 19A of the Constitution (which plea sustained the CMA) the proper course would have been for the learned petitioner to file a petition under Article 184(3). In this regard, Order XXVI of the Supreme Court Rules, 1980 ("SCR"), which relates only to the review jurisdiction, was referred to show that an application for enforcement of fundamental rights under Article 184(3) of the Constitution did not lie in terms thereof. Such petitions /applications are treated in the SCR under Order XXV and it was submitted that the two courses could not be conflated and intermingled. Therefore, it was submitted, the CMA was not maintainable and ought to be dismissed.

9. In response to the preliminary objection, the learned petitioner relied on O. 33, R. 6 SCR. This well known rule relates to the inherent powers of the Court and is in the following terms:

> "Nothing in these Rules shall be deemed to limit or otherwise affect the inherent powers of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."

The learned petitioner submitted that the Court had ample powers under the afore-mentioned Rule to make an order of any nature which would further the "ends of justice" or "prevent abuse of the process of the Court". He added that the transgressions and illegalities committed by the respondents in his case necessitated public broadcast and/or live streaming of the review proceedings so that the public would become aware of the truth. He, therefore,

contended that the present case was a fit one for the Court to exercise its powers under Rule 6.

10. We have carefully considered the preliminary objection and the reply thereto. Certainly, the prayer made in the CMA, as candidly (and quite properly) accepted by the learned petitioner himself, is novel. As far as the records show no such request has previously been made. In essence, the CMA seeks enforcement of two fundamental rights, namely, freedom of speech (Article 19) and right to information (Article 19A). While there is no cavil with the proposition that petitions filed to enforce fundamental rights are to be appreciated, it needs also to be ensured that these are processed through proper channels. Procedural law has to be complied with; otherwise, the judicial system will enter chaos. Therefore, with respect, regardless of how (and not just jurisprudentially) important the claim put forward by a miscellaneous application may be, it cannot be lost sight of that what were before the Court were petitions inviting the exercise of review jurisdiction under Article 188. As has already been elaborated upon in other judgments and decisions (including those emanating from these very review petitions), this jurisdiction is far more restricted in scope compared to the original jurisdiction exercisable under Article 184(3). In short: in review jurisdiction the Court can only determine whether a material irregularity has been committed in the judgment under review and, even if the answer be in the affirmative, it must further be shown that the irregularity has had a substantial effect on the outcome of the case. Reference may be made to the leading case of *Mohammad Amir Khan v. Controller of Estate Duty* PLD 1962 SC 335 at 340. As is clear even on a bare perusal, the CMA, with respect, raises an altogether new prayer that has no nexus with the review jurisdiction of the Court.

11. In contrast to the position when review jurisdiction is being exercised, the Court, when treating a matter in its jurisdiction under Article 184(3), can pass any order of the nature mentioned in Article 199 if two requirements are satisfied: firstly, the case raises a question of public importance and secondly, it is related to a violation of any fundamental right(s). (This is of course only a

summary statement of the jurisdiction, which has over the years developed a rich and complex jurisprudence. What has just been said must be read in the light of the relevant case law.) However, what is relevant for present purposes is that it is Article 184(3), and not Article 188, that would be the proper vehicle for considering relief of the nature sought by, and through, the CMA. Even the case from the Indian jurisdiction cited by the learned petitioner (noted above) tends to show this. In *Swapnil* the jurisdiction of the Indian Supreme Court was invoked under Article 32 of their Constitution (which can be treated as equivalent to our Article 184(3)) for live streaming of cases of constitutional importance having an impact on the public at large. Therefore, even on the basis of the case-law cited by the learned petitioner the CMA involves adjudication of substantive law issues and, with respect, appears to be wrongly filed as a miscellaneous matter in the review jurisdiction of the Court. In our view therefore there appears to be force in the preliminary objection taken.

12. As noted above, the learned petitioner sought to rely on O. 33, R. 6 to overcome the objection of maintainability. With respect, we are unable to agree that the hurdle can be crossed in this manner. The said Rule has no relevance to the facts of this case, in the context of the CMA. It can be invoked by the Court to either further the "ends of justice" or to "prevent abuse of the process of the Court". However, neither of these conditions is engaged in the present context. With respect, it cannot be that the "ends of justice" will be defeated or there will be an "abuse of the process of the Court" if the relief sought in the CMA is not allowed, i.e., public broadcast and/or live streaming of the review proceedings is denied. The primary reason put forward by the learned petitioner was his and his family's constant public humiliation and degradation at the hands of the respondents. Now even if it be accepted that the learned petitioner's reputation (and that of his family) has been tarnished by the acts of the respondents in the manner as contended, no cogent reason was put forward as to how hearings in the present matters, held according to settled practice and time honored principles, would prevent the alleged negative publicity surrounding him from being dispelled. After all, the Court (including

of course this Bench) sits, and was sitting, as an "open court", a term which has been defined in *Black's Law Dictionary*, (10th ed., at page 1263) as being a "court session that the public is free to attend". This obvious point could not be denied and the learned petitioner very fairly conceded the same. However, his insistence was upon the anxiety that arose from the fact that even if the public was allowed to enter the courtroom, this access was subject to limitations such as space constraints (only intensified with the advent of Covid-19). As a result, he submitted, the vast majority of the public would be excluded from observing the review hearings. This apprehension of the learned petitioner is, with respect, without force. For it to be accepted would mean that until the advent of present-day means of communication and broadcast, which have only been around in the modern era, there have never been open and public hearings in the courts of law. What has happened for many centuries prior thereto and is accepted as such even today all around the world—that is, that the open court system is quite sufficient to ensure transparency and openness in the judicial system and of court proceedings—would be cast in doubt, if not abandoned altogether. Such a result cannot, with respect, be countenanced on any view of the matter. Furthermore, it is to be noted that the public, which is always welcome to sit in the open court proceedings, includes members of the press (and also, which is a distinctly recent phenomenon, vloggers and bloggers). They are free to witness Court proceedings and frequently do so. Certainly, they appear to have attended in droves to witness the proceedings both in these review petitions and the proceedings in relation to the hearing of the petitions under Article 184(3) from which these petitions emanate. If therefore the learned petitioner's primary aim was to disseminate his narrative to the public at large, this task can be easily performed, and has been duly performed all along by the journalists and vloggers/bloggers who have throughout closely followed all the proceedings, including his arguments, in Court. Insofar as his expressed anxiety about incorrect reporting is concerned that, with respect, shows little respect for the press and vloggers/bloggers and belittles their efforts and reporting, which is not warranted. In any case it is an accusation (whether stated expressly or impliedly) for which the Court cannot provide a remedy

unless (which is altogether a different matter) the reporting falls within the parameters of contempt as set out in Article 204 of the Constitution. No doubt any alleged misleading reporting of Court proceedings (unfortunate as it may be and as to which we record no finding whatsoever) is of acute discomfiture to the party concerned. However, as has been said in the UK Court of Appeal in *R v Central Independent Television plc* [1994] 3 All ER 641 (*per* Hoffman LJ (as he then was)):

> " ...Newspapers are sometimes irresponsible and their motives in a market economy cannot be expected to be unalloyed by considerations of commercial advantage. And publication may cause needless pain, distress and damage to individuals or harm to other aspects of the public interest. But a freedom which is restricted to what judges think to be responsible or in the public interest is no freedom. Freedom means the right to publish things which government and judges, however well motivated, think should not be published. It means the right to say things which 'right-thinking people' regard as dangerous or irresponsible. This freedom is subject only to clearly defined exceptions laid down by common law or statute... It cannot be too strongly emphasised that outside the established exceptions (or any new ones which Parliament may enact in accordance with its obligations under the convention) there is no question of balancing freedom of speech against other interests. It is a trump card which always wins." (emphasis supplied)

13. In view of the above discussion, we therefore concluded that the preliminary objection taken by the learned AAG had to be sustained and, with respect, the CMA dismissed as not maintainable, on account of being incompetent in the review jurisdiction of the Court.

14. The foregoing is dispositive of the CMA. However, it would not be inappropriate to say something about the substantive law questions raised in the CMA, even if such be only on a tentative and provisional basis. We start with a basic premise: the judicial system should, administratively speaking, be alive and alert, and responsive, to technological advances and changes that can

enhance the transparency and openness of judicial proceedings. An approach that smacks of Luddite thinking should be avoided. But at the same time it should be kept in mind—and this is the corollary—that one need not be dazzled and mesmerized by advances in technology. It must always be remembered that technology is merely a tool and an aid. It is, to use an old fashioned phrase, the servant and not the master. And, if one may borrow a phrase from a different context, simply because yes, we (technologically) can, that does not mean that we, therefore, necessarily must. This side of the coin—the corollary—is unfortunately often lost sight of in the razzmatazz of the Internet age. A sober and robust approach is much to be preferred.

15. Having said that, let us nonetheless return to the basic premise: technological developments should be monitored and appreciated, to ensure that access to justice for litigants is constantly improving. Our dismissal of the CMA should not therefore be construed as an absolute refusal of public broadcast and/or live streaming of Court proceedings. Instead, it should be understood as an exercise in judicial restraint and caution. We are aware that judicial systems around the world are experimenting with cameras in the courtroom. Some are regularly broadcasting /live streaming their proceedings while others are participating in pilot projects. In the former category, we have the UK and Canadian Supreme Courts who have permitted live streaming of their cases since long (the links can be found on their official websites). In the latter group, we have the State and Federal Courts of the USA, all of which are at varying stages in terms of allowing broadcasting of their hearings.

16. We have already expressed the view that the relief sought through the CMA is novel. As a result, there have been no judicial pronouncements by this Court on the merits and demerits of allowing public broadcast and/or live streaming of Court proceedings. However, the decision rendered by the Indian Supreme Court, noted above, provides insight into the factors which may be considered by a Court while deciding a petition seeking such relief, and the manner in which it is to be disposed of. The matter in

Swapnil was in essence a public interest litigation filed by a group of public-spirited persons who sought "Supreme Court case proceedings of constitutional importance having an impact on the public at large or a large number of people to be live streamed in a manner that is easily accessible for public viewing" and for "guidelines to be framed to enable the determination of exceptional cases that qualify for live streaming and to place those guidelines before the Full Court of this Court". The Court allowed the petition but emphasized the issues which had to be sorted out before such live streaming could be permitted. A few of these are listed below for reference:

a. How will the live streaming project be phased;
b. In what categories of cases will live streaming not be permitted;
c. What types of communications will not be streamed;
d. Would Judges/Court have power to disallow live streaming in the interests of justice;
e. How would the identity of witnesses, accused and complainants who wished to remain anonymous be protected;
f. What equipment would be used to live stream proceedings;
g. In what manner would live streaming be done;
h. How much time lag will be provided during the live streaming to ensure that sensitive/confidential information is not revealed;
i. How would the cameras be positioned; and
j. Would the Court retain copyright over the recorded proceedings?

17. A somewhat similar approach was taken in *NDPP*, the other case noted above from South Africa. Although that matter was only concerned with the broadcast of criminal trials, the principles laid down appear to be of general application. In that case the Court accepted that trial court proceedings could be televised but it did not set down any fixed rules to regulate such broadcast and instead left it to the discretion of each trial court to determine whether a case before it is fit for live telecast. The Supreme Court of Appeal also acknowledged that in allowing the broadcast of court

proceedings, the following stakeholders' interests would need to be considered:

a. The interests of the prosecuting authority, the accused and the public to hold a trial that is fair and is seen to be fair;
b. The interests of the media and the public in maintaining freedom of the press and in ensuring open justice;
c. The interests of the participants in the trial process; and
d. The interests of the Court and the public in maintaining the dignity and decorum in the administration of justice.

18. It is significant that these judgments confirm that a decision on public broadcast and/or live streaming cannot be taken hastily. Instead, it is a matter which requires careful consideration of multiple factors and participation of the different stakeholders involved in the judicial system. As a result, this exercise cannot be carried out on the judicial side but can only be deliberated upon on and be approved by the Court in its administrative manifestation. This is evident from the experience of the Indian Supreme Court which referred the matter of live streaming to the Chief Justice for further action. In fact, even in this Court similar matters have been determined by the Full Court sitting on the administrative side, e.g., approval for setting up of video links for hearing cases at the principal seat and the branch registries was given by the Full Court after an extensive discussion. This was followed by the constitution of an IT Committee which was tasked with examining the matter and recommending appropriate solutions. At no stage was the issue referred to in, or decided by, a judicial order. In our view, there appears to be a certain overlap (both technologically and otherwise) between granting permission for hearings through video link and for permitting public broadcast/live streaming of Court proceedings.

19. Accordingly, keeping in view the evolving practice of the Courts around the world and acknowledging the benefits of technology for the justice system, we refer the matter of public broadcast and live streaming of Court proceedings to the Hon'ble Chief Justice so that he may place it before the Full Court for deliberation and appropriate action.

20. The foregoing are the reasons for our short order, noted above, in terms of which the CMA was dismissed.

Judge

Judge

Judge

Judge

Judge

Islamabad,
13.04.2020.

NOT APPROVED FOR REPORTING.