

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

Mr. Justice Manzoor Ahmad Malik
Mr. Justice Syed Mansoor Ali Shah
Mr. Justice Qazi Muhammad Amin Ahmed

Criminal Appeal No.03-P of 2017.

*(On appeal from the judgment of the Peshawar High Court, Peshawar,
dated 26.06.2014 passed in Crl.A.No.633-P of 2012)*

Miss Nusrat Yasmin

...Appellant

versus

The Registrar, Peshawar High Court, Peshawar & others

...Respondents

Appellant: In person

For the respondents: Barrister Qasim Wadud, Addl.A.G. KPK
Mr. Hasan Raza, Sr. Civil Judge
Mr. Khalid Rehman, ASC

Date of hearing: 02.05.2019

JUDGMENT

Syed Mansoor Ali Shah, J.- The appellant before us is a judge, currently working as Additional District and Sessions Judge, Peshawar. She is aggrieved of the strictures recorded against her by the High Court in its judgment dated 26.06.2014 passed in Crl.A.No.633-P of 2012. She prays that these strictures, being uncalled for, harsh and impermissible in law, be expunged from the judgment of the High Court. Leave was granted by this Court to consider this question on 26.09.2017.

2. We have heard the appellant and the counsel for the respondents at some length. Brief background in which the strictures were recorded against the appellant in the judgment is that case FIR no. 97 dated 19.08.2003 was registered against M/s.

Murad Gul, Hazir Bahadur and Khan Bahadur under section 302 /324 read with section 34 PPC in Police Station, Nizampur, District Nowshera for the murder of one Ghulam Haider. Initially, accused Murad Ali was arrested, who alone was tried and convicted by the trial court. On appeal his conviction was set aside and he was acquitted by the High Court. Later, the remaining two accused were also arrested and were tried separately. The trial court, presided by the appellant, convicted them and on appeal, through the judgment in question, the High Court acquitted them of the charge on the ground that similar evidence was disbelieved against the co-accused (Murad Ali) who had already been acquitted. In this case, the trial court presided by the appellant held that the evidence was disbelieved against the co-accused due to certain infirmities qua him (Murad Ali), but regarding the two accused before her, the evidence was firm and confidence-inspiring; hence, the appellant convicted and sentenced them to imprisonment for life, despite earlier acquittal of their co-accused by the High Court. This background resulted in the following observations and remarks by the High Court against the appellant, recorded in the judgment dated 26.06.2014:

"15. We have gone through the impugned judgment of the Trial Court, but did not find any reference from which it may impliedly be inferred that the Trial Court has probably applied the principle of sifting the grain from the chaff. There is no reference to any particular piece of evidence to differentiate the role of the appellants from that of acquitted co-accused. Rather, the learned Trial Judge, namely, Miss Nusrat Yasmin, despite having knowledge of acquittal of co-accused Murad Ali by this Court on the same set of evidence and knowing about finality of findings of this Court, while making unnecessary discussion on section 34 P.P.C. like alien to the law and having no knowledge about the actual essence and application of section 34 P.P.C., labored hard

for convicting the appellants by passing contemptuous observations (*sic*) language against the High Court. The Trial Judge has failed to distinguish the role of the present appellants from that of acquitted co-accused or to point out any new evidence against them. If she while discussing section 34 P.P.C., has held the appellants vicariously liable for single injury on the person of the deceased, then at the same time, not only the appellants are charged for said single injury, but also the acquitted co-accused because general role of firing has been attributed to the appellants and acquitted accused, without attributing that single injury to any one of them. So in such circumstances, what about the acquitted co-accused? The learned Trial Court has not discussed that aspect of the case. Trial Judge while violating the mandate of law and ignoring the sphere of judicial ethic and her duties, has acted like a higher Court, treating this Court as a subordinate Court by passing disgracing language. The relevant part of her observations made in the judgment is re-produced below:-

'As far as the acquittal of co-accused is concerned, it may be added here that he has been acquitted on certain minor discrepancies occurring in the statements of the PWs examined during the said trial and it cannot be accepted as a universal principle that once an evidence was not accepted qua one accused, it can never be accepted against another accused, against whom the case has been proved to the hilt. It is also worth mentioning here that in the trial of acquitted co-accused, line of cross examination over the statement of complainant was quite different and it was certain minor lapses in the cross examination of the complainant which persuaded the Hon'ble High Court to acquit the said co-accused, however, in the instant trial no such lapses can be seen in the statements of the PWs including the complainant and eyewitness, who have furnished very straight forward and trustworthy account of the occurrence and have fully established the prosecution case against the accused facing trial.'

Underlines are for emphasis.

16. We have scrutinized the testimony of complainant and PW Noor Shah Gul in the earlier part of our judgment, from perusal of which, one can better understand their credibility and truthfulness. The learned Trial Judge, has traversed all the limits of judicial ethics by passing such contemptuous observations against the Higher Court, which on one hand, shows her meager knowledge about the law, while on the other hand, her disrespect towards the higher Judiciary, and such exercise on the part of a Judicial Officer, amounts to professional misconduct, which being highly deplorable cannot be countenanced.

17. Additional Registrar (Judicial) of this Court is directed to send copy of the judgment to the Registrar, for proceedings the Judicial Officer under the Government Servants (Efficiency and Disciplinary) Rules, 1973, for misconduct and showing disregard towards the Higher Judiciary, with intimation to this court. Additional Registrar (Judicial) shall circulate copy of the judgment in subordinate Judiciary of the Province for guidance."

3. The question before us is, whether it is befitting and appropriate for the High Court to record judicial stricture (i.e., a stricture recorded in a judgment) against a judge of the District Judiciary relating to his or her ability, conduct, integrity, diligence, behaviour, temperament and competence, while examining his or her judgment? Or can only address these concerns through administrative disciplinary proceedings by invoking its supervisory jurisdiction under the Constitution, the Rules and Orders of the High Court and the law?

4. High Court, under our Constitution, enjoys both judicial and administrative powers and functions. Judicial powers are drawn from the jurisdiction enjoyed by the High Court under the Constitution or the law. Article 175 of the Constitution declares that "no court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law." The High Court enjoys original, appellate and revisional jurisdiction under various provisions of law and the Constitution and while exercising these jurisdictions, the High Court enjoys the power to modify, set aside or uphold the judgment of the courts below. As a matter of routine, the High Court comes across orders of the lower court, which are not justified either in law or in fact, and modifies them or sets them aside. The concept of appeal and revision to a higher forum presumes that a judge in spite of discharging his or her duties to the

best of his abilities and capacity may still err or make a mistake. “A judge who has not committed an error is yet to be born.”¹ The High Court while adjudicating a *lis* is free to examine all aspects of the case that are necessary and integral for the determination of the case and this includes, in a particular case, bias or malice on the part of the judge of the District Judiciary, if the record of the case supports it. This, at best, will result in setting aside the impugned judgment on the ground of bias or malafide. The High Court, while exercising constitutional, appellate or revisional jurisdiction under various laws is to judicially examine and review the orders and judgments of the courts below on questions of law and facts. What is under examination on the judicial side is the legal reasoning behind the order or the judgment. Error, if any, in the legal reasoning, application of law or appraisal of evidence by the courts below, is rectified by the High Court, in accordance with the law, which may include the ground of bias or malice. Stricture recorded in a judgment, on the other hand, is “a severe” and a “sharp criticism or a censorious remark²” and is akin to a “piece of censure³” and passes for a “critical remark⁴” regarding the conduct, integrity, diligence, behaviour, temperament, and competence of a judge. Stricture becomes accessible and remains in the public domain (as part of the judgment) for posterity. Subsequent exoneration of the judge in departmental disciplinary proceedings cannot undo the damage already done, as the stricture continues to exist in the judgment and the mind of the public. Strictures do not

¹ see AIR 1994 SC 1031 & (2008)17 SCC 538

² Chambers 21st Century Dictionary. P.1396 & New Webster’s Dictionary of the English Language. Deluxe Encyclopedic Edition p.969

³ The Concise Oxford Dictionary- New Edition. p.1140

⁴ *ibid.*

restrain the judge from continuing as a judge but at the same time, shatter his confidence and weaken his performance. There is nothing reformatory about a judicial stricture and is a stigma thrust upon a judge with no formal legal recourse to undo it. Public disgrace suffered at the hands of the judicial strictures remains in the public memory, as if, etched in stone.⁵ Fazal Karim J., a distinguished judge of this Court, in *Muhammad Mansha v. The State*⁶, observed:

“2. The subordinate Courts or the inferior Courts as they are sometimes called are an integral part of the judicial system of our country. The description "inferior Courts", or "inferior tribunal" is a categorising and not a derogatory description. Such Courts or tribunals "are not inferior in the doing of justice; nor in the judges who man them, nor in the advocates who plead in them" (Lord Denning in 'Attorney-General v. B.B.C. (1981) A.C. 303, 313). The rule of law depends upon public confidence and public acceptance of the judicial system; therefore, anything which tends to undermine that confidence in the judicial system must be strongly discountenanced. It is for these reasons that we feel that the observations in the order of the learned Judge in the High Court that there were some extraneous considerations which weighed with the learned Additional Sessions Judge for granting bail to Mansha and the direction in para. 9 of the judgment that "Mr. Ghulam Mustafa Shahzad, Additional Sessions Judge, Sheikhpura to appear in person before this Court on 14-11-1995" should not have been made. The sweeping condemning observation that the learned Additional Sessions Judge was moved, in making the impugned order, by "extraneous considerations" and the direction referred to above, must necessarily shake the public confidence' at least the confidence in that officer of the people of the district where he is for the time being serving; it is the more serious because the officer had had no opportunity of explaining his position before the observation was made.”

Therefore, it is desirable that the High Court, while performing its judicial function, avoids passing strictures regarding the ability, competence, integrity, and behaviour of the judge whose judgment

⁵ See *V.K Jain v. High Court of Delhi through Registrar General and Ors.* [(2008)17 SCC 538], *Awani Kumar Upadhyay v. The Hon'ble High Court of Judicature at Allahabad and others.* (AIR 2013 SC 2189) and *Amar Pal Singh v. State of U.P. and another* (AIR 2012 SC 1995).

⁶ PLD 1996 SC 229

is under scrutiny before it. A judge of the High Court, even if unhappy over the quality of the judgment under challenge, must not let go of judicial precaution and propriety and restraint from making a personal remark. The articulation, scholarship and legal reasoning of the judgment of the High Court, couched in moderation, temperance, and sobriety, will automatically highlight the error and mistake of the lower Court. The High Court is not to assume the role of a critic of the personal attributes and abilities of the judge. Instead the High Court, maintaining its judicial majesty, is to focus only on the legal reasoning of the judgment under challenge. Passing strictures and publically rebuking, condemning and reproaching a judge does not sit well with the judicial character of the High Court. It is equally inappropriate to summon a judge of the District Judiciary to court for a public reprimand, during the hearing of the case against his judgment, in open Court. The character of judicial determination by the High Court does not allow the court to go beyond and assess, evaluate and appraise the competence, diligence, conduct, integrity or temperament of a judge of the District Judiciary, other than judicial bias or malice if it is borne out from the record of the case and is essential for the determination of the *lis*. Needless to mention, that it is equally necessary for a judge of the District Judiciary to refer or distinguish the judgments of the superiors courts with care, caution and respect. The "judicial powers" enjoyed by the High Court are only to examine the legality of the order or judgment/decreed passed by the judge of the District Judiciary. The observations of this Court made

in *Abdul Khaliq v. Khan Bahadur*⁷ may advantageously be referred in this regard. This Court observed:

“3. The complainant filed a revision application before the Bench of Lahore High Court at Rawalpindi and the learned Judge in Chamber vide order dated 20-11-1995 impugned before us in this petition has cancelled the bail. Perusal of the impugned order shows that the learned Judge of the High Court in Chamber had called the Magistrate and asked from him as to why had [he] granted bail in that case. This amounts to reprimand and we do not approve such action by the Judges of the superior Courts. If judicial order is found not to have been passed in accordance with law, it can be set aside by the upper forum which is competent to do so. Even the learned Judge in the High Court could have set aside the order according to law, if he came to such conclusion, without calling the Magistrate with a view to reprimand him.”
(emphasis supplied)

5. While it is not in the majesty, character, and dignity of the High Court or the justice system to pass judicial strictures and summon judges of the District Judiciary in open court, it is eminently within the constitutional domain of the High Court and indeed desirable that the High Court, where appropriate, exercises supervisory control over the District judiciary through administrative disciplinary mechanisms.⁸ The power to supervise and control the District Judiciary is to be exercised by the High Court (Chief Justice and Judges of the Court) under Articles 202 and 203 of the Constitution while exercising its administrative authority. This constitutional responsibility vests in the High Court and not in a judge of a High Court exercising judicial power. The power to supervise and control is actualized through High Court Rules and Orders and service laws that govern the judges of the

⁷ PLD 1996 SC 176

⁸ also see: William G. Ross, *Civility among Judges: Charting the Bounds of Proper Criticism by Judges of Other Judges*, 51 F.L.A. L. R.E.V. 957, 974 (1999).

District Judiciary. The structure of service law⁹ relating to the District Judiciary empowers the *competent authority* (the Chief Justice or the Administrative Committee of the High Court) to take disciplinary action against the judge.

6. High Court has ways of expressing disapproval of judgments of the lower courts. In case inadvertent errors or irregularities of the lower courts are noticed by the High Court they can be brought to the notice of the judge concerned through a memorandum or a note addressed to the said judge by the High Court on the administrative side but not through the judgment, in exercise of its judicial function. It is important to refer to Rule 4 of Part-A, Chapter-1 of the Rules and Orders of the Lahore High Court¹⁰ (Volume IV) which provides as under:

“4. Appellate Courts should point out to lower Courts errors and irregularities.—It is very desirable that Appellate Courts should apart from disposing of appeals judicially, bring to the notice of subordinate Courts errors or irregularities in procedure which may be observed in the course of hearing appeals. Unnecessary adjournments; undue delay in disposing of cases; omission to hear cases on the days fixed; too harsh a use of the summary procedure allowed by law in cases in which defaults in attendance, or in producing evidence or the like, occur; failure to examine thoroughly the parties and to arrive at an intelligent appreciation of the points in dispute, and similar matters should always be brought to the notice of officers concerned in a note or memorandum separate from the judgment.”

(emphasis supplied)

The above Rule shows that in cases of inadvertent lapses, errors or mistakes committed by the judges of the District Judiciary, which

⁹ (in this case) Khyber Pakhtunkhwa Judicial Service Rules, 2001 and Khyber Pakhtunkhwa Government Servants (Efficiency and Discipline) Rules, 2011.

¹⁰ Vide High Court of West Pakistan Notification No. 111 S/IV-A.13 dated 14-10-1965, Lahore High Court Rules and Order were made applicable to the High Court of West Pakistan and its Benches at Peshawar and Karachi. Later on these Rules continue to have the force of law by virtue of Article 268 of the Constitution.

are condonable, the judges of the High Court may point them out to the judge of the District Judiciary through an administrative note or memorandum, maintaining a correctional approach. This also passes for a piece of elderly advice, guidance and counselling of the judge of the District Judiciary by the High Court. The note or memorandum do not form part of the judgment but are separate administrative communiqués delivered to the judge confidentially and also do not form part of the service dossier of the judge.

7. However, in cases where Judge(s) of the High Court, espouses an opinion that the judge of the District Judiciary has exhibited grave incompetence or has misconducted himself in discharge of judicial duty and needs to be warned or proceeded against, the appropriate process is to inform the competent authority on the administrative side through a confidential note addressed to the Chief Justice of the Court, alongwith copies of the relevant judgment(s), and then leaving it to the discretion of the competent authority to take appropriate disciplinary action against the judge concerned. This discreet and confidential process is consistent with the deliberative character of the judicial system.

8. We, therefore, hold that High Court should not pass strictures in a judgment against a judge of the District Judiciary or summon a judge in judicial proceedings, relating to his or her judgment, for public reprimand in open court. The course open to the High Court is on the administrative side and the judge(s) of the High Court hearing the case, can apprise the Chief Justice of the Court through a confidential administrative note highlighting the grave illegalities, irregularities and improprieties noticed, leaving it

to the Chief Justice or the Administrative Committee of the High Court, as the case may be, to take an appropriate disciplinary action against the judge of the District Judiciary.

9. For the above reasons, we expunge the strictures recorded against the appellant in the impugned judgment dated 26.06.2014 passed by the Peshawar High Court in Crl.A.No.633-P of 2012. They shall not form part of the service record of the appellant or in any manner influence the competent authority against the appellant judge in her service matters. This appeal is allowed in these terms.

10. The Assistant Registrar of the Peshawar Branch Registry of this Court shall ensure that a copy of this judgment is dispatched to the Registrars of all High Courts, who shall circulate it among all Judges of the respective High Court, for their information.

11. It is clarified that this judgment is restricted to judicial strictures passed by High Court against a judge of the District Judiciary while performing his or her judicial function.

Judge

Judge

Peshawar,
02nd May, 2019.
Approved for reporting.

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Judge