JUDGMENT-SHEET
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD

JUDICIAL DEPARTMENT

Crl. Rev. No.14 of 2022

Muhammad Shahzad alias Dad
Versus
Akhlaq Ahmad and another

Petitioner by	:	Raja Rizwan Abbasi, ASC.
Respondents by	:	Mr. Muhammad Bilal, Advocate
Date of hearing:		05.09.2022

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ARBAB MUHAMMAD TAHIR, J: Through the instant revision petition, petitioner namely *Muhammad Shahzad alias Dad*, impugns order dated 20.01.2022, passed by the learned Additional Sessions Judge-IV, Islamabad (East) whereby his application in terms of Section 540-A Cr.P.C for exemption from personal appearance was dismissed in following terms:-

> "Perusal of record reveals that after admission of instant private complaint accused were summoned by the court. All the accused persons except Muhammad Shahzad appeared before the Court and submitted their bail bonds but accused/petitioner Muhammad Shahzad instead of appearing before the court filed the application for his exemption. There is no signature of the petitioner on the application. Furthermore, no Wakalatnama signed by the petitioner is annexed with the application. .Before framing of charge, attendance cannot be dispensed with. At the time of exemption physical presence of petitioner/accused is necessary and after his physical presence if the court comes to the conclusion that petitioner is incapable of remaining before the court, he may be exempted from his personal appearance. Accused/petitioner is required to appear before the Court for the purpose of framing of charge but he instead of putting his appearance before the court filed this exemption application. The presence of accused /petitioner is necessary for the framing of charge and before framing of charge his attendance cannot be dispensed with. Instant application is without any force same is dismissed."

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2. Tersely, petitioner along with 9 others were booked in FIR No.380 dated 26.11.2019, under Section 302, 371-A, 371-B, 148 and 149 PPC, registered on the complaint of respondent No.1 namely *Akhlaq Ahmad* at Police Station Lohi Bher, Islamabad. In the State Case, the prosecution recommended to challan the accused persons by placing them in column No.2 as pursuant to investigation conducted by the Special Investigation Team-SIT, they were declared innocent as no evidence with regard to commission of *qatl-i-amd* had surfaced. After submission of challan, petitioner along with other accused persons was formally charge-sheeted on 21.03.2021.

3. On the same date, i.e. 21.03.2021, the respondent, filed private complaint under Section 302, 147 and 149 PPC wherein the accused persons including the petitioner were duly summoned. The accused persons except the petitioner put in appearance while the latter opted to file application under Section 540-A Cr.P.C. for his exemption from personal appearance. The learned Trial Court after hearing the arguments proceeded to dismiss the application vide impugned order, hence instant revision petition.

4. Learned counsel in support of instant petition argued that earlier in the State Case, the petitioner had been present before the Court at the time of framing of the charge and subsequently under the compelling circumstances left the country due to severe sickness of his daughter; that the petitioner is being represented by his duly authorized counsel; that attendance of the petitioner can be procured through various online modes; that under the law the purpose of the trial is to ascertain the truth and not to punish the accused until proved guilty; that if an accused opts to be represented by a pleader, his application should be considered favorably; that in case of the petitioner, the criteria for invoking provision of Section 540-A Cr.P.C is fulfilled as more than one accused persons are appearing before the Court and that the request of the petitioner is bonafide and

duly supported by medical certificate of his daughter. The learned counsel placed reliance upon case law reported as **1982 SCMR 1006, 2002 P.Cr.L.J 947, 1989 P.Cr.L.J 1652, 1980 P.Cr.L.J 1 and PLD 1988 Karachi 379**.

5. On the other hand, the learned counsel forrespondent No.1 repelled the above submissions by contending that the accused has to be physically present before the Court and if subsequently he has become incapable of remaining present, exemption can be granted to him for reasons to be recorded; that after admission of private complaint, the petitioner never appeared before the Court; that the petitioner left the country without any order on his application for exemption which even in the State Case was allowed for just one time and that exemption on personal appearance could not be granted until the accused is present before the Court. According to the learned counsel, it is mandatory for an accused to be present before the Court and to explain his inability to remain present before the Court and for the former requirement physical presence of the accused before the Court is indispensable. Learned counsel fortified his submissions by placing reliance upon case law reported as **1994 SCMR 2177, 2014 P.Cr.L.J. 1434, 2010 MLD 1395 (Lahore), pld 2010 Lahore 270 and 2004 YLR 745.**

6. Heard, record examined.

7. The matter governing exemption of an accused from personal appearance in a trail or inquiry is governed by Section 540-A of the Code of Criminal procedure, 1898 which reads as under:-

> **"540-A. Provision for inquiries and trial being held in the absence of accused in certain cases**. (1) At any stage of an inquiry or trial under this code, where two or more accused are before the Court, if the Judge or Magistrate is satisfied for reason to be recorded, that any one or more of such accused is or incapable of remaining before the Court, he may, if such accused is represented by a pleader, dispense with his attendance and proceed with such inquiry or trial in

> his absence, and may, at any subsequent stage of the proceedings, direct the personal attendance of such accused.
> (2) If the accused in any such case is not represented by a pleader, or if the Judge or Magistrate considers his personal attendance necessary, he may, if he thinks fit, and for reasons to be recorded by him either adjourn such inquiry or trial, or order that the case of such accused be taken up or tried separately."

8. The above provision bestows authority to a Judge or Magistrate to dispense with personal attendance of an accused for reasons to be recorded where two or more accused are before the Court, incapable to remain present before the Court and may be represented by a pleader. On the subject, the Hon'ble apex Court in **Haji Aurangzeb v Mushtaq Ahmad and another (PLD 2004 SC 160)**had graciously held in terms that:-

> "We will, therefore, conclude that normally the accused has to be physically present in the Court for claiming exemption and that if the Court is satisfied about his incapability of remaining before the Court, the Court may, proceed to grant exemption. Incapability is word of wide import and may cover all circumstances beyond the control of the accused. **The exemption could be granted in absence in extremely exceptional cases like ailment of accused which rendered his movement difficult (like the case of paralysis) or departure from country or station is absolutely necessary and there is no time to have recourse to the Court for seeking permission/exemption**. It may be observed that the provision i.e. section 540-A Cr.P.C. covers cases of temporary exemption from one or two dates of hearing or exemption till the conclusion of inquiry/trial. The Courts have to pass appropriate orders depending on the facts and circumstances of the case."
> (**Emphasis added**)

10. The above principle elaborated incapability as circumstances beyond control of an accused person while exemption could be granted in absence in extremely exceptional cases like ailment, departure from country or station is absolutely necessary and there is no time to have recourse to the Court for seeking permission/exemption.

11. In the present case, the application of the petitioner for exemption from personal appearance was dismissed on the premise that before framing of the charge, attendance cannot be dispensed with; that physical presence at the time of exemption is necessary and that for the purpose of framing of charge, the petitioner is required to appear before the Court while the important aspects that earlier the petitioner and other accused persons had been appearing before the Court in the State Case; that he was present at the time of framing of the charge in the State Case; that once he was granted exemption from personal appearance and that the circumstances being made basis to seek exemption i.e. chronic ailment of his daughter, were not taken into consideration. Whether the case of petitioner does fall within the ambit of "exception" as argued is required to be adjudged in the light of attending circumstances of the case, therefore, it would be appropriate that the matter is sent back to the learned trial Court for its decision afresh.

12. In view of above, instant criminal petition is **allowed,** impugned order dated 20.01.2022 is set aside. The application under Section 540-A Cr.P.C. filed by the petitioner for his exemption from personal appearance shall be deemed pending which shall be decided afresh after taking into consideration all aspects including the one highlighted above in accordance with the principle on the subject within shortest possible time preferably within fortnight from the receipt of this order.

(ARBAB MUHAMMAD TAHIR)
JUDGE

*A.R. Ansari**

Announced in open court on : .09.2022.

JUDGE.