ORDER SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

Crl. Rev. No.32-2023
Imran Khan Niazi
Vs.
District Election Commissioner, Islamabad & Another

S. No. of order/ proceedings	Date of order/ Proceedings	Order with signature of Judge and that of parties or counsel where necessary.
	07.03.2023	Mr. Qaiser Imam, Mr. Ali Bukhari, Barrister Gohar Ali Khan, Mr. Khalid Yousaf Ch., Mirza Asim Baig, Mr. Saeed Khan Sadozai, Mr. Umer Farooq Marwat and Mr. Naeem Haider Panjatha, Advocates for petitioner.

A complaint was filed by respondent No.2 under section 190 of the Elections Act, 2017 against the petitioner. After recording of cursory statements, process was ordered to be issued by learned trial court on 15.12.2022 and the matter was adjourned to 09.01.2023 for the petitioner to enter appearance. On 09.01.2023, the petitioner did not enter appearance in person and the matter was adjourned to 31.01.2023; on the said date as well, the petitioner did not enter appearance personally, but only was represented by his counsel. On the same date, Election Commission of Pakistan requested for issuance of non-bailable warrants of arrest of the petitioner, but the said request was turned down, however, learned counsel for the petitioner was directed to execute bail bonds in the sum of Rs.20000 with one surety in the like amount for attendance of the accused

during trial and the matter was adjourned to 07.02.2023; on the referred date as well, the petitioner did not enter appearance and the matter was adjourned to 21.02.2023; on 21.02.2023 as well, the petitioner did not enter appearance personally but was represented by his counsel. The formality regarding providing of the cursory statements and other documents was fulfilled and the matter was adjourned to 28.02.2023; on 28.02.2023 as well, the petitioner did not enter appearance hence non-bailable warrants of arrest of the petitioner were ordered to be issued for 06.03.2023; on the said date again, the petitioner did not enter appearance but made an application for cancellation of non-bailable warrants, which application was dismissed vide order dated 06.03.2023. The instant petition calls in question orders dated 28.02.2023 as well as 06.03.2023.

2. Learned counsel for the petitioner *inter alia* contended that petitioner is ready and willing to face trial, however, due to security threats he is not able to attend the court. It was contended that warrants that were issued for the purpose of arrest of the petitioner are not within spirit of law, viz section 204 of Code of Criminal Procedure, 1898 (the Code) as well as other ancillary provisions. It was submitted that if reasonable time is allowed, the petitioner shall enter appearance before learned trial court. Learned counsel was asked to obtain instructions as to reasonable time to

be allowed to enter appearance and the proceedings were adjourned for half an hour. After lapse of said time, learned counsel for the petitioner contended that he has instructions to request for four weeks time for the petitioner to enter appearance.

3. Though notice was not issued but Mr. Jahangir Khan Jadoon, learned Advocate General ICT, on watching brief, entered appearance and contended that since this Court is already hearing bail application of the petitioner (Crl. Misc. No.272-B-2023), which is fixed for 09.03.2023, hence it is only appropriate that time be allowed to the petitioner for the said date to enter appearance before learned trial court.

4. In response, Mr. Ali Bukhari, Advocate Supreme Court, appearing for the petitioner, contended that security threats and concerns are of such nature that it is not possible for the petitioner to enter appearance before learned trial court.

5. Rival submissions made by learned counsels for the parties have been heard and the documents, placed on record, examined with their able assistance.

6. The background, leading to filing of instant petition, has been mentioned hereinabove.

7. Section 204 of the Code provides for issuance of process when the court takes cognizance of an offence, if there is sufficient

material. For the ease of convenience, section 204 of the Code is reproduced below:-

"204. Issue of process. (1) If in the opinion of a Court taking cognizance of an offence there is sufficient ground for proceeding and the case appears to be one in which, according to the fourth column of the second schedule a summons should issue in the first instance, (it) shall issue its summons for the attendance of the accused. If the case appears to be one in which, according to that column, a warrant should issue in the first instances, it may issue a warrant, or, if it thinks fit, a summons for causing the accused to be brought or to appear at a certain time before such Court or (if it has not jurisdiction itself), some other Court having jurisdiction.

(2) Nothing in this section shall be deemed to affect the provisions of Section 90.

(3) When by any law for the time being in force any process fees or other fees are payable, no process shall be issued until the fees are paid, and, if such fees are not paid within a reasonable time, the Court may dismiss the complaint".

8. Spirit of section 204 ibid was explained by Supreme Court of Pakistan in case reported as 'Luqman Ali Vs. Hazaro' (2010 SCMR 611) in the following words:-

"10. Thus, the purpose of section 204, Cr.P.C. is to procure the attendance of the accused by issuing the required process. If the accused is in custody then such process can be issued by issuing production order to the jail authorities and if the accused is absconding then the process can be issued in the shape of warrants. It is pointed out that if the accused is absconding or released then the name of accused of both the categories are required to be mentioned in Column No.2 of the Challan with red and blue ink, respectively. Therefore, the process is to be issued to the accused, who is absconding and similar process can also be issued to an accused whose name is in Column No.2 with blue ink after he is made an accused in the case. It will be noted that warrants are addressed to the Police Officer to arrest the person and produce him before the Court on a particular date. Thereafter the said warrants become ineffective unless extended or re-issued by the Court. Similar is the case with the bailable warrants under which the Police Officer is required not to arrest the accused if he furnishes surety before him for his appearance before the Court on the date mentioned in the warrants. After appearance of the said accused before the Court the said order ceases to exist unless the accused is released in accordance with law".

9. The process that is issued takes the form of summons/warrants. In the first place, summon is issued under section 68 of the Code and where none enters appearance, warrant of arrest generally is issued under

section 75 of the Code. The warrants are of two categories i.e. bailable and non-bailable. In the former category, the officer to whom warrants is addressed is to ensure attendance of the accused and can accept his bail, if sufficient surety is tendered by the person who is to appear before the court. In the case of non-bailable warrants, the officer to whom it is addressed, is to ensure presence of the accused by way of his arrest. The warrant so issued under section 75(2) of the Code remains in existence unless the same is cancelled or is executed.

10. The legal position with respect to issuance of process and summons or warrants and the path to be adopted by such accused person was taken up by the Supreme Court of Pakistan in case reported as Sarwar and others Vs. The State and others (2014 SCMR 1762). After discussing the entire case law on the subject, the matter was concluded in the following manner:-

"30. As a result of the discussion made above we hold that the law propounded by the Lahore High Court, Lahore in the case of Mazhar Hussain Shah v. The State (1986 PCr.LJ 2359) and by this Court in the cases of Reham Dad v. Syed Mazhar Hussain Shah and others (Criminal Appeal No. 56 of 1986 decided on 14-1-1987) and Syed Muhammad Firdaus and others v. The State (2005 SCMR 784) was a correct enunciation of the law vis-a-vis the provisions of sections 204 and 91, Cr.P.C. and it is concluded with great respect and veneration that the law declared by the High Court of Sindh, Karachi in the case of Noor Nabi and 3 others v. The State (2005 PCr.LJ 505) and by this Court in the case of Luqman Ali v. Hazaro and another (2010 SCMR 611) in respect of the said legal provisions was not correct. As held in the cases of Mazhar Hussain Shah, Reham Dad and Syed Muhammad Firdaus (supra) the correct legal position is as follows:-

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(i) A process is issued to an accused person under section 204, Cr.P.C. when the court taking cognizance of the offence is of the "opinion" that there is "sufficient ground" for "proceeding" against the accused person and an opinion of a court about availability of sufficient ground for proceeding against an accused person cannot be equated with appearance of "reasonable grounds" to the court for "believing" that he "has been guilty" of an offence within the contemplation of subsection (1) of section 497, Cr.P.C. Due to these differences in the words used in section 204 and section 497, Cr.P.C. the intent of the legislature becomes apparent that the provisions of section 91, Cr.P.C. and section 497, Cr.P.C. are meant to cater for different situations.

(ii) If the court issuing process against an accused person decides to issue summons for appearance of the accused person before it then the intention of the court is not to put the accused person under any restraint at that stage and if the accused person appears before the court in response to the summons issued for his appearance then the court may require him to execute a bond, with or without sureties, so as to ensure his future appearance before the court as and when required.

(iii) If in response to the summons issued for his appearance the accused person appears before the court but fails to submit the requisite bond for his future appearance to the satisfaction of the court or to provide the required sureties then the accused person may be committed by the court to custody till he submits the requisite bond or provides the required sureties.

We may add that

(iv) If the process issued by a court against an accused person under section 204, Cr.P.C. is through a warrant, bailable or non-bailable, then the accused person may be under some kind or form of restraint and, therefore, he may apply for his pre-arrest bail if he so chooses which may or may not be granted by the court depending upon the circumstances of the case but even in such a case upon appearance of the accused person before the court he may, in the discretion of the court, be required by the court to execute a bond for his future appearance, with or without sureties, obviating the requirement of bail".

11. In somewhat similar circumstances, Captain (R) Muhammad Safdar, who was facing NAB Reference, was ordered to be arrested and produced before learned trial court and was released on personal surety; NAB challenged the order of release by the Judge, Accountability Court through W.P. No.3765-2017. The referred writ petition was

dismissed by the Division Bench of this Court with the following observations;-

> *"10. As noted above, when an accused who has not been arrested during the course of investigation by NAB, fails to appear before the Accountability Court, his presence can be procured through warrants of arrest, which can be bailable or non-bailable. Where bailable warrants are issued by the Accountability Court, an accused can either appear before the Court and submit Bond and/or surety or can apply for Bail before arrest by way of a petition under Article 199 of the Constitution. However, where an accused is arrested by the authorities in pursuance of warrants issued by the Accountability Court, the Accountability Court though has no jurisdiction to grant bail but can require the person to furnish Bond and/or surety, as the purpose of his arrest, was to procure attendance before the Court. The referred conclusion is deduced from the above mentioned obiter by the august Apex Court and the same is binding on this court. The contention by the learned Deputy Prosecutor General NAB that case reported (2014 SCMR 1762) is not applicable on the facts and in the circumstances of the case, as it covered only complaint cases, is spurned, as we are of the opinion that, the above quoted dicta of the august Apex Court, is squarely applicable in the instant case.*

12. In the instant case, the order sheet appended with the petition clearly shows that the petitioner has never appeared personally before the court on a single date and exemption from appearance was sought. On 28.02.2023, the case was taken up a number of times firstly, in the morning, then at 2:00 pm and lastly at 3:30 pm and due to persistent absence of the petitioner, the order for issuance of non-bailable warrants was made. It is a general practice that initially, if an accused is not appearing before the court, bailable warrants are issued and the purpose of the same has been explained hereinabove and only if accused still does not appear, non-bailable warrants of arrest are issued. In the

instant case, learned trial court issued non-bailable warrants of the petitioner straightaway and the reasons cited in the order are that there is persistent non-appearance and even on the date in question, he had opted to chose other courts for appearance and not the learned trial court.

13. I do not tend to agree with the submission by learned counsel for the petitioner that police approached the petitioner in order to arrest him for some ulterior purpose; as noted above, the purpose of issuance of non-bailable warrants is to ensure presence of the accused (in the instant case the petitioner) for appearance before the learned trial court, even if that requires his arrest. Since the proceedings before learned trial court are for framing of the charge, the presence of the petitioner is a must, as the charge is to be framed and read out to him and he is to be proceeded in response thereof. In view of referred position, learned trial court adopted the correct path by issuance of non-bailable warrants of arrest; in the referred circumstances, applicable way forward for the petitioner, is provided in paragraph 30(iv) of the dictum of Supreme Court of Pakistan in case reported as 2014 SCMR 1762 supra and where such is the case, that warrants bailable or non-bailable has been issued, the petitioner has the option for applying for pre-arrest bail, if he so chooses or may appear before the court and the court, in its discretion, may

require the accused to execute a bond for his future appearance with or without surety obviating requirement of bail.

14. In the referred backdrop of the events and the law on the subject, the petitioner had to tender appearance before learned trial court today, when the case was fixed for framing of the charge, however, security reasons were quoted as the basis for non-appearance, which in the facts and circumstances, are not relevant inasmuch as the country is facing wave of terrorism attacks and in such state of affairs, threat exists for every citizen of Pakistan and on account of the same, entire system cannot come to halt. However, as is obvious from order dated 06.03.2023 by the learned trial court and even at Bar today, willingness was shown on behalf of petitioner regarding entering appearance before learned trial court provided four weeks time is allowed; the time offered on behalf of petitioner to enter appearance before learned trial court is unreasonable but in order to meet the ends of justice, it is only appropriate that some time is allowed to the petitioner to enter appearance before learned trial court before proceedings are initiated to declare him as a 'proclaimed offender'.

15. Even though, no illegality, as such, has been pointed out by learned counsel for the petitioner in the impugned orders; it is only appropriate in the interest of justice that an opportunity is allowed to the petitioner for

making appearance without the hanging sword of relevant police officer arresting him to produce before the court or initiation of procedure under sections 87 & 88 of the Code.

16. For the above reasons, non-bailable warrants of arrest issued to procure attendance of the petitioner shall remain suspended/in abeyance till 13.03.2023, on which date, the petitioner shall positively appear before learned trial court to face the proceedings. In case, the petitioner does not tender appearance on the date in question, suspension shall cease to have effect and the learned trial court shall be at liberty to proceed in accordance with law.

17. The instant petition is disposed of in above terms.

(CHIEF JUSTICE)

Zawar