JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Writ Petition no.1642 of 2023
Akhuanzada Shahid Ali Qureshi
versus
Judge Special Court (Offences in Banks), Islamabad and others

Petitioner by:	Mr. Ghulam Farooq Awan, Advocate
Respondent No.2 by:	Raja Rizwan Abbasi, Advocate
Respondent No.3 by:	Mr. Azmat Bashir Tarar, Assistant Attorney General with Rana Shahid Habib, AD/FIA ACC
Date of Decision:	**05.07.2023**

Sardar Ejaz Ishaq Khan, J:- The petitioner is aggrieved with the impugned order dated 29.04.2023 passed by Judge Special Court, Islamabad, declining his application for return of his mobile phone and for unfreezing his bank accounts by the FIA. His mobile phone was taken by the FIA when he was arrested in FIR no.35, dated 22.09.2022, under sections 409, 420, 489-F PPC registered at P.S. FIA/CBC, Islamabad.

2 The petitioner was arrested on 22.09.2022. His phone remains with the FIA for the last 10 months. The learned trial court without applying its mind merely referred to FIA's reply that the phone was locked, that the accused was not providing the code to unlock the phone, that the forensic examination of the phone could not be carried out as a result, and hence the phone was retained.

3 Learned counsel for the petitioner submitted that in the 4 applications for remand of the accused no mention of the phone being required in connection with the investigation was mentioned. Further, the incomplete challan dated 26.10.2022 that records the FIA taking into custody everything under the sun connected with the complaint, including the accused's locker records, remains silent about the phone; no word is mentioned of the need for the forensic examination of the accused's phone or any information therein that is believed to be of relevance to the offence.

4 Learned counsel for the complainant claimed that the phone "might" contain conversations or messages between the accused and his absconding co-accused that on discovery "might" further the investigation. So there are two

consecutive hypotheticals that in his professional view justify the retention of the phone. We are stunned by this submission by a senior criminal counsel.

5 Admittedly, the phone is not the case property. It was seized on search of the accused on his arrest, and therefore constitutes "… *property taken under section 51*" for the purposes of section 523 CrPC. The IO was bound under section 523 to report its seizure forthwith to the Magistrate, who would have then passed an order respecting the custody and production of the phone. The IO was repeatedly asked why he did not act under section 523 CrPC, but he had no answer, nor did his learned counsel.

6 We are surprised at the complainant's leaned counsel's persistent argument in Court that the FIA was entitled to retain the phone because the accused was not providing the code to unlock the phone. We take this opportunity to remind him of his higher duty to the Court and to the ethics of his calling than to his brief, and take this opportunity to impart a refresher on the fundamentals of the Constitutional and criminal law, whereby an accused cannot be compelled to incriminate himself. While the police has the power to obtain search warrants, or ask the court to summon a document or thing under section 94 CrPC, or even force its entry into premises to which ingress is denied under section 48 CrPC, an accused cannot be compelled to disclose evidence against himself. Apart from that the FIA has not come up with any evidence corroborating its suspicion that the phone contains incriminating conversation between the accused and his absconding co-accused, and merely suspects that to be the case, then, even if FIA's suspicion were to be considered credible for a while, it does not entail that the accused be compelled to produce that conversation to incriminate himself. This is forbidden under Article 13(b) of the Constitution, which stipulates that *no person shall, when accused of an offence, be compelled to be a witness against himself*; detaining an accused's phone under threat of its inordinate detention unless he were to unlock it to reveal its incriminating contents is tantamount to compelling the accused to be a witness against himself. In *Alpha Insurance Company Limited versus United Insurance Company of Pakistan Limited* (1996 SCMR 1668), the Supreme Court elaborated that:

> As regards the protection afforded by this Article (Article 13(b)), if the accused considers any piece of evidence as incriminating him, the

> privilege granted can be claimed. He has to refer the authority, be it police or Court or any other, to his privilege and the exercise of it by him. The Police is not competent to determine whether the privilege has been properly exercised by him or not. Its exercise is sufficient for it to hold its hands. The Police thereafter cannot take the coercive steps that are reserved for it under section 94 Cr.P.C. for getting through the accused such documents.

7 Further, such conduct by the IO also falls foul of section 343 CrPC whereby *no influence, by means of any promise or threat or otherwise, shall be used to an accused person to induce him to disclose or withhold any matter within his knowledge*. In this case, inordinate retention of the phone is tantamount to influencing the accused to induce him to disclose conversations in his knowledge. As the FIA has not gathered any conversation or message from devices other than the accused's phone purported to have originated or terminated from or at the accused's phone to corroborate FIA's assertion, FIA's stance is merely a fishing trip, made all the more lucrative given that the phone in question is an iPhone 13 Pro Max which is quite an expensive phone.

8 If FIA's stance were to be legitimized, it would have monstrously absurd consequences, for how would that not be logically equivalent to the FIA walking away with the entire wardrobe of the accused on the suspicion that one of the jackets might have a secret pocket, that might contain a letter from the absconding co-accused, and on not finding that secret pocket, refuse to return the clothes until the accused discloses the suspected secret pocket? How would the privacy of information contained in the phone about the accused's personal and family's private matters that have no bearing on the offence be protected from abuse? These of course are matters that require deep thought by the Law Commission to address if it can find the time and the urge, but for now we take the law as it stands.

9 Turning now to the unfreezing of the bank accounts, we are again surprised that the application was turned down for the reason that the application did not contain the bank account numbers. The record contains those numbers, and it would have been only a matter of asking the accused to give those numbers in the court if they were not written in the application.

10 The investigation file includes the SOPs[1] on freezing of bank accounts that qualify for freezing, and the critical pre-requisite is that those accounts contain the whole or part of the proceeds of the alleged crime. The IO conceded that the frozen bank accounts did not contain the whole or any part of the proceeds of the alleged crime. When asked as to why the accounts continued to be frozen, he again had no answer. The Court was informed that the said accounts do not contain more than a few hundred thousand Rupees, whereas the alleged crime is in the sum of approximately Rs.250 million.

11 Resultantly, we **allow** this petition, set aside the impugned order, and direct the FIA to return the accused's mobile phone and to unfreeze his bank accounts forthwith.

12 A copy of this judgment is to be sent by the office to the DG, FIA, to initiate an inquiry on the detention of the phone without an appropriate court order, and on the continued freezing of the accounts in breach of the SOPs. The inquiry is to be completed and a report is to be filed with the Registrar of this Court within 2 weeks from receipt of a copy this judgment in the DG's office. The report will affix responsibility, with recommendations for disciplinary action. The Registrar will put up the report in Chambers on receipt, and is to move a note if the inquiry report is not submitted within 2 weeks.

(Chief Justice) **(Sardar Ejaz Ishaq Khan)**
Judge

Approved for reporting

Imran

[1] GOVERNMENT OF PAKISTAN (OFFICE OF AML DIRECTORATE) FEDERAL INVESTIGATION AGENCY HEADQUARTERS, SECTOR G-9/4, ISLAMABAD
No. HQ/ECW/102/2022/1007-18 Dated:18.10.2022

a. It belongs to the alleged person(s) or his/her dependent and has nexus or relevance to the alleged offence/ subject matter of the inquiry or investigation.
b. It contains the whole or any part of the proceeds of the alleged crime/ subject matter of the inquiry or investigation.
c. It contains money to be used in the commission of the alleged offence/ subject matter of the inquiry or investigation.