JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT
ISLAMABAD

CASE NO. : CRIMINAL APPEAL NO.01-2019
Mian Muhammad Nawaz Sharif
Vs.
State through Chairman, National Accountability Bureau, Islamabad

Appellant by	: Nemo
Respondent by	: Mr. Jahanzeb Khan Bharwana, Additional Prosecutor General, NAB, Mr. Imran-ul-Haq Khan, Deputy Prosecutor General, NAB, Sardar Muzaffar Abbasi, Deputy Prosecutor General, NAB, Mr. Naeem Tariq Sanghera, Special Prosecutor, NAB and Syed Jalal Hussain, Special Prosecutor, NAB.
Amicus Curiae	: Mr. Azam Nazeer Tarar, Advocate, Mr. Hassan Nawaz Makhdoom, Advocate, Barrister Asad Ullah, Advocate Barrister Hammad Masood, Advocate, Syed Faisal Qadir Shah, Advocate and Mr. Usman Ghumman, Advocate.
Date of hearing	: 23.06.2021

AAMER FAROOQ J. Appellant Mian Muhammad Nawaz Sharif was tried and convicted in Reference No.19-2017 by learned Accountability Court No.II, Islamabad vide judgment dated 24.12.2018. He filed instant appeal against the referred judgment and was released on bail for a period of eight weeks. He failed to surrender despite lapse of eight weeks hence was declared an absconder i.e. fugitive from law after following the codal formalities for procuring his attendance before this Court.

2. In order to determine the way forward in the appeal, Mr. Azam Nazeer Tarar, Advocate Supreme Court was appointed as Amicus Curiae to assist; he tendered arguments on the last date of hearing i.e. 09.06.2021 as well as today. He submitted that trial in absentia is generally declared null and void by the august Apex Court and for that, placed reliance on cases reported as Abrab Khan versus The State (2010 SCMR 755); Muhammad Arif

versus The State (2008 SCMR 829); Mir Ikhlaq Ahmad versus The State (2008 SCMR 951); The State versus Abdul Jabbar (2017 SCMR 1213); CDA versus Raja M. Zaman, etc. (PLD 2007 SC 121); The State versus Naeem Ullah Khan (2001 SCMR 1461) and Muhammad Hanif, etc. versus The State (2001 SCMR 84). He also submitted that appeal since is continuation of trial hence the appeal, in absence of the appellant, also cannot be heard. In furtherance of his arguments, Mr. Azam Nazeer Tarar, Advocate has placed reliance on case reported as 'Ikramullah and others Vs. The State' (2015 SCMR 1002) by stating that after decision of case reported as 'Hayat Bakhsh and Others Vs. The State' (PLD 1981 SC 265), there is a shift in the approach towards appeals, where appellant is fugitive from law and that probably is due to incorporation of Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973 pursuant to 18th Amendment in the Constitution. It was submitted that in case reported as 'Ikramullah and others Vs. The State' (2015 SCMR 1002), though the august Apex Court dismissed the appeal yet observed that same may be resurrected as and when the appellant surrenders before the authorities and wishes to apply that his appeal be heard. He also placed on record various orders passed by Hon'ble Lahore High Court as well as Hon'ble Peshawar High Court and Hon'ble Sindh High Court, whereby following the case reported as 2015 SCMR 1002, appeals of the persons, fugitive from law, were dismissed or adjourned sine die with the observation that same may be resurrected.

3. Mr. Hassan Nawaz Makhdoom, Advocate Supreme Court appearing alongside Mr. Azam Nazeer Tarar, Advocate made submissions to the effect that Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973 has made incumbent that every person should receive fair trial and adjudication of the matter after due process; he cited various paragraphs from the Book 'Access to Justice in Pakistan' by Justice Fazal Karim to

substantiate his arguments. Reliance was also placed on cases reported as 'Babula Lagarwala Vs. The State-Opposite Party' (PLD 1961 Dacca 523) and 'Karam Ellahi Vs. The State' (PLD 2007 Supreme Court 255), especially the dissenting note by Mr. Justice Syed Jamshed Ali (as he then was).

4. Responding to the arguments by Mr. Azam Nazeer Tarar, Advocate as well as Mr. Hassan Nawaz Makhdoom, Advocate Mr. Jahanzeb Khan Bharwana, Additional Prosecutor General, NAB reiterated his arguments, which he addressed previously on 09.06.2021. He placed reliance on various cases reported as Hayat Bakhsh and others versus The State (PLD 1981 SC 265), Chan Shah versus The Crown (PLD 1956 FC 43); Inam ul Rahiem versus Chairman, NAB, Islamabad and another (PLD 2018 Islamabad 251); The State versus Haji Nasim-ur-Rehman (PLD 2005 SC 270); Awal Gul versus Zawar Khan and others (PLD 1985 SC 402); Benazir Bhuttoo versus The State (1999 SCMR 1619) and Muhammad Jan versus The State (2002 PCr.LJ 1006) with special emphasis on case reported as Hayat Bakhsh and others versus The State (PLD 1981 SC 265) as well as order of the Hon'ble Supreme Court of Pakistan dated 01.04.2019 in Civil Review Petition No.513 of 2014 in Constitution Petition No.14 of 2018 titled 'Lahore High Court Bar Association etc. Vs. General (R) Pervez Musharraf etc.

5. Arguments advanced have been heard and the judgments relied upon examined with able assistance of the counsel.

6. In case reported as 'Chan Shah Vs. The Crown' (PLD 1956 Federal Court 43), it was observed that where the petitioner, as a fugitive from justice, presented himself before an attorney and signed a power of attorney in his favour for the presentation to the Federal Court a petition for special leave to appeal and the same was duly filed, in such an eventuality, the court would not act in aid of a person who was a fugitive from justice and the petition was to be dismissed. It was also observed that it is an

essential condition of the administration of justice, in a case affecting an individual or individuals, that the persons concerned should submit to the due process of justice.

7. In the celebrated judgment reported as 'Hayat Bakhsh and Others Vs. The State' (PLD 1981 SC 265), five Member Bench of august Apex Court laid down elaborate guidelines catering the situation, where the appellant absconds and/or is fugitive from law and has also filed appeal. The observations made, in this behalf, are as follows:-

> *"There is considerable weight in the argument that when a convict becomes fugitive before filing petition for leave to appeal, his petition itself would not be properly constituted. This can be noticed as one line of reasoning in the case of Gul Hassan. The second proposition submitted by the learned counsel is also correct; because it flows from the first one. If a convict after filing a petition becomes fugitive and does not surrender, he deprives himself of the relief claimed in the petition. Similarly, there would be no difference if he absconds after obtaining special leave to appeal, or after obtaining a bail order. It is not possible to agree with Mr. Zafar that in this situation the absconder can get the benefit of his appeal being kept pending sine die till he surrenders. Nor will there be any justification for the proposition that if there are more convicts/appellants, the appeal of the absconder should be separated and adjourned sine die to await his surrender in case he cannot be benefitted on the hearing of the appeal of his co appellant. There is no basis or principle for adopting this suggestion as a normal course by this Court; and if that is done, it would be placing premium on the negative conduct of the absconding appellant if he is allowed to remain fugitive from justice and also benefitted by deciding his appeal in his favour when hearing the appeal of his co-convict. Such a course, if adopted as a normal routine, would not only encourage abuse of process of this Court, but would also disturb the fabric of administration of justice at the appellate stage. However, there is considerable force in the argument of Mr. Zafar that an acquitted accused cannot be convicted by the Supreme Court without a decision on merits, justifying the reversal of judgment of acquittal. And although in an appeal against acquittal it would not be illegal or even improper to hear the counsel of an acquitted accused who is on bail, it is not so for a fugitive. It would be the negation of the principles enunciated by this Court (that a fugitive from justice loses right of hearing if he defies the orders of the Court for his surrender and or otherwise abuses its process), if, while he remains fugitive, he is allowed to be represented by another person so that his plea might be heard. In order to maintain consistency, in such a situation, although the Court would be obliged itself to examine the merits of the case for setting aside the acquittal, if need be the absconding acquitted accused would not be entitled to be heard, even*

through a counsel. It is a different matter if the Court for its own benefit seeks assistance from one or the other counsel appearing for the parties before it, including a co-accused of the absconding respondent, or from any other counsel, but the absconding accused would not be entitled, as of right, to a hearing. Reliance of the learned counsel on the provisions contained to section 512, Cr. P. C. is of not much help in this behalf. While the present controversy relates to the hearing of or otherwise determination of an appeal, section 512, Cr. P. C. deals with trials. Moreover, the said provision is not attracted to the form and procedure of this Court. It would not be possible at all to adjourn an appeal against acquittal even against a single acquitted accused/absconding respondent, for an indefinite period, although the Office of the Court would make efforts to secure his surrender/arrest in obedience to the process of the Court, for a reasonable period before fixing the appeal for hearing; and if he remains fugitive, the Court would proceed to determine the appeal in his absence. If after examination of the case the acquittal merits to be reversed, there would be no impediment to decide the appeal accordingly, but in case the judgment of acquittal merits to be maintained, the same would not be reversed on account of the abscondence of the accused/respondent. This would apply to both the situations whether the appeal is against one acquitted or more. The submission of the learned counsel that while dealing with the controversy the Court should keep in view its power to do complete justice is undoubtedly weighty, but as already indicated, this power is concomitant with the power of the Court to pass such orders as are necessary for the ends of justice and also for the prevention of the abuse of the process of the Court. These aspects of rendering justice cannot be visualized and considered in isolated water tight compartments. They have to be put in juxtaposition because they react upon each other and that is the only course to keep the stream of justice flowing uninterrupted and unsullied.

The principle laid down in the cases of Chan Shah and Gul Hassan do not in any way merit review. Rather, some of them need to be reiterated and reaffirmed: The Court would not act in aid of a person who is fugitive from justice; the inherent power cannot be invoked in his favour because it is essential condition of the, administration of justice that the person concerned should submit to the due process of justice; where an individual seeks interference of the sovereign to obtain the reversal of a judicial order, he cannot succeed if he himself is engaged in setting that judicial order at naught; the Court would in order to avoid taking drastic action of the dismissal of a matter on account of such a conduct of the person concerned, would afford opportunity to him through some adjournments in the expectation that he might be induced to surrender; this all being in accord with the basic principles governing administration of criminal justice, it is the duty of the person representing the accused, to secure. so for as it is within his power, the appearance of the accused before the Court on the first day of the hearing and, thereafter, if so advised, to seek an order for bail or suspension of sentence, if it is an appeal by the convict. Apart from the foregoing principles laid down in the case of Chan

> *Shah, these aspects were further elaborated in Gul Hassan's case: if a person is fugitive from justice and is in the state of abscondence, an appeal cannot be filed on his behalf on the basis of a power-of-attorney executed by him before his abscondence and the same would apply to a power of attorney executed during abscondence; that a fugitive in effect, in view of the principles laid down in the case of Chan Shah, is also a contemner and further that he is not entitled to hearing; that even if it is a case of confirmation of death sentence under section 374, Cr. P. C. if the convict decamps, he thereby forfeits the right of audience and the High Court would, in such a situation, be competent to consider the case of confirmation of his death sentence and confirm the same even in his absence the confirmation of course will have to be on merits of the case; and this Court would not hesitate even after grant of leave to appeal on the application of such a person, to rescind the leave. It may be clarified here that in the case of Gul Hassan leave to appeal having been obtained on the basis of an incompetent petition for leave to appeal, it was thought adviseable to adopt the course of rescinding the leave granting order; Applying the principles which are now being reiterated and reaffirmed, it would not be necessary in, all the cases to adopt the same procedure, as the Court would be competent when such an occasion arises, to dismiss the appeal itself".*

8. In case reported as 'Awal Gul Vs. Zawar Khan and others' (PLD 1985 SC 402), it was observed that fugitive from law loses some of normal rights granted by procedural and also substantive law. It was also observed that unexplained notice-able abscondence disentitles a person to concession of bail notwithstanding merits of case.

9. The Hon'ble Supreme Court of Pakistan vide order dated 01.04.2019 in Civil Review Petition No.513 of 2014 in Constitution Petition No.14 of 2018 titled 'Lahore High Court Bar Association etc. Vs. General (R) Pervez Musharraf etc. reiterated that fugitive from law loses right of audience. This principle was followed by this Court in case reported as 'Inam ul Rahiem Vs. Chairman, National Accountability Bureau, Islamabad and another' (PLD 2018 Islamabad 251).

10. In case reported as 'Ikramullah and others Vs. The State' (2015 SCMR 1002), while reiterating the principle that fugitive from law loses the right of audience; the august Apex Court dismissed the appeal, however, clarified that if appellant is

recaptured, he may apply before the court seeking resurrection of the appeal. Subsequent to that, Hon'ble Lahore High Court has been following the practice on the basis of principle pronounced in case reported as 2015 SCMR 1002 supra and even in some cases the appeals were consigned to record.

11. Undoubtedly, case reported as 'Hayat Bakhsh and Others Vs. The State' (PLD 1981 SC 265) was handed down when Article 10-A of the Constitution was not in field, however Articles 4 & 9 of the Constitution providing similar guarantees were part of the Constitution. Undoubtedly, the august Apex Court in a number of cases held trials to be null and void where the accused was absconder but in the instant case, matter is somewhat different inasmuch as the appellant had been appearing before learned trial court. There is also no cavil to the principle that appeal is continuation of trial but again, the circumstances of instant case are different, as the appellant was in custody and was granted bail for eight weeks by this Court vide order dated 29.10.2019 in W.P. No.3716-2019, however, he proceeded abroad and failed to surrender despite lapse of eight weeks, hence was declared absconder vide order dated 02.12.2020 after following the procedure.

12. In view of above position of law and practice, two courses are available to this Court; either to dismiss the appeal outrightly as was the case in judgment reported as 'Hayat Bakhsh and Others Vs. The State' (PLD 1981 SC 265) or follow the dictum laid down in case reported as 'Ikramullah and others Vs. The State' (2015 SCMR 1002). It is pertinent to point out that the decision rendered by the august Apex Court in case reported as PLD 1981 SC 265 supra was by a five Members Bench, whereas the decision handed down in case reported as 2015 SCMR 1002 is by a three Members Bench, hence former decision still holds the field and is binding despite being earlier in time. Reliance is placed on cases reported as 'Ch. Muhammad Saleem Vs. Fazal Ahmad and two

others' (1997 SCMR 315), 'All Pakistan Newspapers Society and others Vs. Federation of Pakistan and others' (PLD 2004 SC 600), 'Hassan and others Vs. The State and others' (PLD 2013 SC 793) and 'Sindh High Court Bar Association through its Secretary and another Vs. Federation of Pakistan through Secretary, Ministry of Law and Justice, Islamabad and others (PLD 2009 SC 879). Even otherwise, there is little or no difference between cases reported as PLD 1981 SC 265 and 2015 SCMR 1002 inasmuch as in the latter case, an observation was made specifically providing option to the appellant for resurrection of appeal while dismissing the same, whereas similar views were expressed in case reported as PLD 1981 SC 265 while concluding the matter and it was stated that absconders before hearing of the appeals of the co-convicts can appear and make application for hearing case on merits, the same would be fixed before fixation of appeals of co-convicts. Much emphasis was laid on Article 10-A of the Constitution by Mr. Hassan Nawaz Makhdoom, ASC viz that right of fair trial, is a must in every case. In this behalf, Article 10-A of the Constitution provides for the determination of civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process. In case reported as Hayat Bakhsh supra, the Hon'ble Supreme Court observed that there is no bar on the Supreme Court to dispose of a criminal appeal on consideration that the accused person has abused the process of the Court. There is nothing in the Constitution or the Rules to compel the Court to decide on merits an appeal filed by an accused person who has chosen to be fugitive from justice and while remaining so decides to disobey or frustrate the orders, directions and process of the Court from which he seeks justice. Appellant was provided fair trial and now has absconded from justice at the time of hearing of appeal hence the referred Article of Constitution, is of no avail to him. Mian Muhammad Nawaz Sharif was provided a fair trial inasmuch as learned trial court

provided him opportunity of hearing as well as cross-examining the prosecution witnesses and only after the proper trial, his conviction was recorded; he despite being on bail, proceeded abroad and did not appear before this Court despite on bail and without any justification or basis, remained absent on a number of dates of hearing hence this Court was left with no option but to follow the procedure as provided in Code of Criminal Procedure, 1898 and declared him as fugitive from law.

13. In view of foregoing, since appellant is fugitive from law hence has lost his right of audience before this Court and we are left with no choice except to dismiss his appeal.

14. For the above reasons, instant appeal is dismissed. Appellant may file an application before this Court, as and when he surrenders or is captured by the authorities, for decision of the appeal on merits. Needless to observe that the said application, if and when is made, shall be decided in accordance with law.

(MOHSIN AKHTAR KAYANI)
JUDGE

(AAMER FAROOQ)
JUDGE

Zawar