Form No: HCJD/C

JUDGEMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Case No: Criminal Revision No. 108 of 2023

Imran Ahmad Khan Niazi
Vs.
District Election Commissioner

Petitioner by:	M/s. Kh. Haris Ahmed, Senior ASC, Dr. Yaser Aman Khan, ASC, Barrister Gohar Ali Khan, ASC, M. Shoaib Shaheen, Senior ASC, Syed Muhammad Ali Bukhari, Niazullah Khan Niazi, Hashim Butt, Malik Naseem Abbas Nasir, Zaynib Chaudhary, Malik Muhammad Fiaz Kandwal, Salman Ayub, Khalid Yousaf Ch. Malik Tariq Noon, Ashfaq Ahmed Kharral, Mirza Asim Baig, Azam Khan Niazi, Saeed Khan Sadozai, Qamar Anayet Raja, Raja Muhammad Haroon, Tanveer Ahmed Rajpoot, Naheed Iqbal Awan, Murtaza Toori, Shaheena Shahabuddin, Advocates.
Respondent by:	M/s. Muhammad Amjad Pervez, ASC, Muhammad Nawaz Ch., advocates. Mr. Arshad Mahmood Kayani, D.A.G. Khurram Shahzad, Additional Director (Law), Zaigham Anees, Law Officer ECP.
Date of Decision:	**03.08.2023.**

AAMER FAROOQ, C.J.- This order shall decide the instant criminal revision as well as Criminal Revision No.114/2023, Criminal Revision No.74/2023, Criminal Revision No.76/2023 and Criminal Miscellaneous (Transfer Application) No.662/2023 as they have arisen out of the proceedings pending before the Sessions Court (West), Islamabad. The petitioner is facing trial in the complaint filed by

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Election Commission of Pakistan (ECP) under Section 137 (4) read with Section 109 of the Election Act, 2017 (the Act).

2. The petitioner, during the course of proceedings, filed an application challenging the jurisdiction of the Trial Court on the basis that the complaint filed by ECP is barred by limitation and also is defective as the person signing the complaint on behalf of ECP was not duly authorized. The referred application was dismissed by the Trial Court vide order dated 05.05.2023. The referred order was challenged before this Court and was the subject matter of Criminal Revision No.75/2023. The referred criminal revision was allowed by this Court on 04.07.2023 and the matter was remanded for rehearing within seven days. The post remand matter was decided on 08.07.2023 by way of dismissal of the objections *qua* jurisdiction of the Court. The said order has been assailed in Criminal Revision No.108/2023. The petitioner also filed an application regarding the jurisdiction of the Court on the basis that the matter ought to have been taken into cognizance by the Trial Court after it had been routed through the Magistrate as provided in Section 193 of Cr.P.C. The said application was also dismissed by the Trial Court on 05.05.2023 and has been challenged in Criminal Revision No.74/2023. The petitioner also questioned the issuance of summons by the Trial Court vide order dated 15.12.2022 on the basis that it ought to have looked into the jurisdictional defects before issuance of summons. The said order has been assailed in Criminal Revision No.76/2023.

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3. During the course of proceedings a transfer application under Section 526 Cr.P.C. was filed on the basis of bias of the Judge presiding the Trial Court; primarily, on the ground that the charge was framed against the petitioner in haste and improper fashion and also the contentions of the petitioner in various applications have not been decided correctly. Later, in the proceedings an application was filed before the Trial Court for recusal in the matter on the basis of some alleged posts on the Facebook account of the Presiding Officer which showed his biasness. The said application was dismissed by the Trial Court on 18.07.2023 and is under challenged in Criminal Revision No.114/2023.

4. While arguing the Criminal Revision No.108/2023, Kh. Haris Ahmed, Senior ASC, learned counsel for the petitioner, *inter alia,* contended that this Court in Criminal Revision No.75/2023 had remanded the matter to the Trial Court by framing different questions as to the legal issues involved and granted seven days time. It was argued that even before the lapse of seven days the matter was decided without providing an opportunity of hearing to the petitioner as the adjournments were sought but the Trial Court instead of granting adjournments dismissed the application. It was contended that even now the petitioner has no cavil with the remand of the matter but only that it ought to be remaindered to a different Presiding Officer as the Presiding Officer currently seized of the matter has disclosed its mind and has repeated the order earlier made dated 05.05.2023. Reference was made to ***Allah Dittah v. The State*** **(PLD 1960 SC 18).** It was

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argued that since the petitioner has been condemned unheard the proper course is to remand the matter but to a different Court in light of the observations made in ***Allah Dittah v. The State*** **(PLD 1960 SC 18)** and it was contended that on this account no arguments on merit are being addressed. Learned counsel specified that in case the Court is minded to decide the matter on merit he would address the arguments accordingly. Similarly, learned counsel submitted that order dated 05.05.2023 which is the subject matter of Criminal Revision No.74/2023 is without application of mind and does not take into account the contentions on behalf of the petitioner. He added that since the matter was decided without application of mind the proper course is to remand back the matter but before a different Presiding Officer. Learned counsel did not really press the Criminal Revision No.76/2023; however, contended that the same has been filed by way of abundant caution to counter the arguments of the complainant that the issuance of summons were never challenged, hence legal objection cannot be raised subsequently.

5. Learned counsel further submitted that he seeks transfer of the matter from the Court of current Presiding Officer seized of the matter not on account of bias as such but the way proceedings have been conducted by him in an undue haste by jeopardizing right of the petitioner of fair trial as provided under Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973 (the Constitution). He submitted that the application for recusal was made on account of some posts made on Facebook account of the Presiding Officer which was turned down without any justification or basis.

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6. Mr. Amjad Pervez, ASC controverted the contentions of the learned counsel for the petitioner and submitted that there is no justification or basis for remitting the matter to a different Court inasmuch as the Presiding Officer has not misconducted himself during the course of trial nor has shown any bias against the petitioner. He submitted that challenging interlocutory orders in order to stall the proceedings of the Trial Court has been deprecated by the Hon'ble Supreme Court of Pakistan. Reference was made to ***Mushtaq Hussain Shah Bukhari v. The State*** **(1991 SCMR 2136),** *Mohtarma* ***Benazir Bhutto v. The State*** **(1999 SCMR 1447).** He distinguished the facts of ***Allah Dittah v. The State*** **(PLD 1960 SC 18)** and submitted that this Court has already in the case titled ***Mian Muhammad Nawaz Sharif v. The State*** **(2019 P.Cr.L.J. 389)** has held that a decision on an issue by the Presiding Officer does not bar him from sitting in the same case or a connected case in subsequent matters. Learned counsel highlighted the conduct of the petitioner by saying that the posts on the Facebook account have been found to be fake and fictitious and argued that the same was done to malign the Court and bring the judiciary to disrepute. Learned counsel submitted that no bias of the Court as such is made out in the facts and circumstances which mandates the transfer of the case to a different Court.

7. In rebuttal, Kh. Haris Ahmed, Senior ASC submitted that the Federal Investigation Agency report on the issue of fake posts on Facebook is a unilateral act and cannot form basis for any further action.

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8. Submissions made by the learned counsel for the parties have been heard and the documents placed on record examined with their able assistance.

9. The background leading to filing of above petitions have been mentioned in detail, hence need not be repeated. The thrust of the arguments by the learned counsel for the petitioner in Criminal Revision No.108/2023 is that he has not been heard and the matter stands decided before expiry of the period prescribed by this Court in Criminal Revision No.75/2023. He requested that the matter be remanded before a different Court. In ***Allah Dittah v. The State*** **(PLD 1960 SC 18)** the trial on merit was conducted and the appeal was heard by the learned Division Bench of the High Court and another accused was absconder and tried later and while hearing his appeal the different Bench followed the earlier judgment without due deliberation as to the evidence available and in the referred backdrop the Hon'ble Supreme Court of Pakistan while remanding the matter directed that the matter be reheard by a different Bench. Disclosure of mind on an issue does not *per se* disqualify a Judge to hear the matter again. Reference is made to the judgment of the Division Bench of this Court in ***Mian Muhammad Nawaz Sharif v. The State*** **(2019 P.Cr.L.J. 389)**. The Division Bench of this Court observed as follows:

> *"Be that as it may, the pivotal question that needs to be answered is whether the findings given by A.C. No.1, in its judgment dated 06.07.2018, passed in Reference No.20/2017 on certain aspects which are also the subject matter of References Nos.18 and 19/2017, would*

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disqualify the learned Presiding Officer of A.C. No.I to sit in an adjudicating capacity over the said References. Now it must be appreciated that the learned counsel for the applicant was not clear in his position as to whether the applicant would be taking a defence or producing evidence during the hearing of References Nos.18 and 19/2017. As mentioned above, the applicant did not take a defence or produce evidence during the hearing of Reference No. 20/2017. It is clearly within the realm of possibilities for A.C. No.I to come to a conclusion different in References Nos.18 and 19/2017 from the one in Reference No.20/2017 in the event, the applicant decides to take a defence or produce evidence. There is no denying the fact that there are several dissimilarities in the facts in the three References. To hold that the learned Presiding Officer of A.C. No.I would come to the same very conclusion against the applicant and other accused as the one in Reference No.20/2017 would be presumptive and speculative."

10. Similarly, in ***Benazir Bhutto v. The State*** **(1999 SCMR 1447)** the Hon'ble Supreme Court of Pakistan observed that mere fact that Ehtesab Bench has passed an interlocutory order that the documents were admissible does not render it to powerless to revisit the decision if dictates of justice so demand. While making the referred observation reliance was placed on ***Rabert Camoron. V. Philipsi*** ***(AIR 37 Lahore 176)*** wherein it was held that where through an interlocutory order evident had been admitted to go on record subsequently the Court seized of the matter could hold it as inadmissible. In light of the referred view in ***Benazir Bhutto v. The State*** **(1999 SCMR 1447) and**

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Muhammad Nawaz Sharif v. The State **(2019 P.Cr.L.J. 389)** *supra* the fact that the Presiding Officer has decided the matter in a particular way is no bar for him to hear it again and reach to a different conclusion if the dictates of justice so requires. The impugned order in Criminal Revision No.108/2023 shows that a number of opportunities were provided to the petitioner to address arguments but adjournments were sought, hence the matter was decided in the absence of learned counsel for the petitioner so the learned counsel for the petitioner is correct in saying that he has been condemned unheard and it would be only appropriate to remand the matter back to the Trial Court for decision afresh. However, it is not essential that the matter be sent to a different Presiding Officer or the Court for the reasons as mentioned in the judgments mentioned hereinabove. It is emphasized that remitting the matter to different Presiding Officer can be regarded as matter of propriety and not principle of law. However, in the instant case even remanding the matter to a different Court is not mandated.

11. Insofar as the Criminal Revision No.74/2023 is concerned, the same is also based on the same premise that the arguments addressed by the learned counsel for the petitioner have not been appreciated correctly, hence the matter be remanded to the Trial Court with the different Presiding Officer. Since no serious arguments were made on merit and only to the referred extent it would be appropriate to send the matter again to the Trial Court to decide afresh but not to a different Presiding Officer for the reasons mentioned hereinabove.

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12. Though the learned counsel for the petitioner did not really press the grounds of bias in seeking transfer of the case from Court of Mr. Hamayoon Dilawar, Additional Sessions Judge (West), Islamabad to another Court but in the petition the ground of bias has been raised as to the framing of charge and not appreciating the submissions made by the learned counsel for the petitioner. Moreover, as noted above, during the course of trial application for recusal of the Presiding Officer was also made on the basis of alleged posts on Facebook account of the Presiding Officer. It is pertinent to mentioned here that this Court on 25.07.2023 referred the matter to Federal Investigation Agency to probe into the issue of posts on Facebook account of Mr. Hamayoon Dilawar, Additional Sessions Judge (West), Islamabad as he denied that the said posts were even made by him. Federal Investigation Agency filed its report pursuant to order of this Court and according to it the authenticity of screenshots cannot be determined due to non-availability of URL/link and the profile of the account of Mr. Hamayoon Dilawar, Additional Sessions Judge (West), Islamabad that the URL/link as www.fb.com.dilawardilawar.3154 has been thoroughly and technically examined/analysis and no post in question/screenshots were found. Learned counsel for the petitioner was correct in submitting that the referred report cannot unilaterally form basis for taking any further action; however, the matter needs to be probed further and inquiry is to be made by involving all those persons who without verifying the authenticity of the posts used the same to malign a senior Judicial

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Officer of Islamabad Judiciary, especially, when there is a categorical denial on his part that the referred posts are not from his account.

13. As mentioned above, though the learned counsel for the petitioner has not agitated the bias *per se* but on account of the fact that almost day-to-day proceedings were conducted by him questions the undue haste and the manner in which the same was conducted. In ***Nawaz v. Ghulam Qadir*** **(1975 P.Cr.L.J. 676)** where the applicant sought transfer of the case from one Court to another on the allegation of political enmity; the request was turned down on the basis that no such evidence was available. Similarly, in ***Abdul Ghafoor v. the State*** **(1993 P.Cr.L.J. 1784)** again where the transfer of a case was sought on the basis of political affiliation of the Presiding Officer with one of the parties; the request for transfer was turned down. Likewise, in the same case the request for transfer on the basis of undue haste by the Trial Court was turned down as not applicable in the facts and circumstances *viz* nothing existed on the record to the effect. The Hon'ble Lahore High Court in a fairly recent decision in ***Abdul Razzaq. V The State and 2 others*** (**2022 P.Cr.L.J. 741**) by following the case law on the subject laid down the principles for transfer or otherwise of a case under Section 526 Cr.P.C. from one Court to another which are as follows:

> *"Following are the principles settled on the question of transfer of a case from one Court to another:*
>
> *(a) A case should not be transferred from the Court of competent jurisdiction unless the allegations are supported by strong reasons or convincing evidence.*

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(b) If such applications are allowed, it would impliedly mean that the allegations against a Judge have been deemed to be correct and such situation will certainly lower the image, dignity and honour of judiciary in the eyes of public at large.

Transfer of a case is to be allowed only in exceptional circumstances where the grounds urged are based on strong reasons and evidence. If this practice is not followed strictly, the parties are likely to take undue advantage by filing application for transfer of their cases on flimsy, frivolous and baseless grounds.

(c) While considering a transfer application, it must be kept in mind that the parties should not be allowed to pick and choose the Court of their own choice or liking.

(d) Interference in the working of the trial Courts on fallacious grounds would give rise to a sense of insecurity amongst the Judicial Officers and in such eventuality the Judicial Officers may not be able to work with required vigor.

(e) Vague and general allegations cannot be made the ground of transfer.

(f) The Judges should equally be protected from frivolous transfer applications in order to achieve transparent even-handed justice so that one of the litigants should not be in a position to overpower the Judge which might ultimately result in tilting scale of justice under fear and malignity.

(g) Suspicion or artificial and baseless apprehensions are not sufficient to seek transfer of

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case. Any bald statement containing allegation is not sufficient to allow the transfer."

14. The Court highlighted that the transfer should be allowed only in exceptional circumstances where the ground urged or is based on strong reasons or evidence. It was also observed that if the transfer is made in routine or casual manner that would destroy the dignity of the Court and would be a ploy by a party to drag the matter and malign the Judiciary. The Hon'ble Supreme Court of Pakistan in ***PIslamic Republic of Pakistan v. Abdul Wali Khan*** **(PLD 1976 SC 57)** observed that the basis of disqualification of a Judge on personal bias or prejudice of such a nature as would necessarily render a Judge unable to exercise his intention impartially in a particular case and this must be shown as a matter of fact and not merely as a matter of opinion. It is settled principle that mere wrong order or orders by a Presiding Officer would not suffice as a ground for transfer or show his bias towards a party. In ***Independent Media Corporation v. Federation of Pakistan*** (**PLD 2014 SC 650**) it was observed that the Courts are not to succumb to any remarks defamatory or otherwise. It is the conscious of the Judge himself to determine his decision to sit on a Bench or not. In ***Pervez Musharaf v. Nadeem Advocate*** **(PLD 2014 SC 585)** the Hon'ble Supreme Court of Pakistan observed that a Judge by training does not allow any vilification to cloud his judgment in a judicial matter and even extremely derogatory language used against Judges does not, by itself create bias. In ***Kanwar Naveed Jameel and 5 others v. Province***

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of Sindh etc. (**PLD 2022 Sindh 499**) the Division Bench of Sindh High Court held that it is well settled by now that it is for a Judge to himself to determine whether to recuse from the case or not. There is ample case laws that where it is apparent that perception of bias/ impartiality is being created by a litigant or a counsel to divert a case from a Bench which he perceives as unfavourable to a Bench which he perceives as more favourable. To succumb to such tactics would not only send the message that the Judges can be cowed into submission by such tactics, it would also erode public confidence in the Courts and at the same time it would increase the work load of the Bench to whom the case is passed on.

15. The upshot of above discussion is that for decision on Criminal Revision No.108/2023 and Criminal Revision No.74/2023 an other opportunity ought to be granted to the petitioner to present his case before the Trial Court but before the same Presiding Officer as disclosure of mind on the subject involved *per se* is no bar for rehearing the matter in light of the judgments cited above. There is no justification of basis for transfer of matter from the Court of Hamayoon Dilawar, Additional Sessions Judge (West), Islamabad to another Court on the touchstone of the principle that no bias or apprehension of biasness is made out. In this behalf it is elaborated that mere fact that the trial is being conducted expeditiously does not show the bias of the Judge. Likewise, wrong orders also do not mean that the Presiding Officer is biased in any way. The posts on Facebook account which formed basis for making application for recusal also do not seems to be

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authentic or genuine *prima facie*, especially when the Presiding Officer categorically denied the same. Attack made on the issuance of summons which is the subject matter of Criminal Revision No.76/2023 stands covered in the arguments which are to be heard with respect to the decision on 05.05.2023 pursuant to Section 193 Cr.P.C. and on the basis of limitation and authority of ECP.

16. During the course of proceedings in Criminal Revision No.74/2023 an application was filed under Diary No.11873 of 2023 seeking transfer of case from this Bench to another; an objection was raised by the Office that under the High Court Rules and Orders the transfer application does not lie. The Office objection is sustained.

17. For the above reasons, Criminal Revision No.108/2023 and Criminal Revision No.74/2023 are allowed and the matter is remanded to the Trial Court for decision afresh. This Court was informed that the matter is pending for final arguments tomorrow i.e. 04.08.2023, the petitioner shall ensure addressing of arguments positively on the issue when matter is fixed by Court for final arguments. The Trial Court shall address the issues raised in the referred petitions while deciding the matter. Criminal Revision No.114/2023 and Criminal Miscellaneous (Transfer Application) No.662/2023 are dismissed. Criminal Revision No.76/2023 is disposed of as not warranting any interference for the reasons mentioned above. All the pending applications are also disposed of accordingly.

18. Before parting, as observed that Federal Investigation Agency has rendered its report *prima facie* that the alleged posts on the

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Facebook account of Mr. Hamayoon Dilawar, Additional Sessions Judge (West), Islamabad Presiding Officer of Trial Court are not authentic. Federal Investigation Agency is directed to inquire in the matter in detail and involve everyone concerned and furnish a report to Deputy Registrar (Judicial) of this Court within a fortnight.

(CHIEF JUSTICE)

M.Naveed

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